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Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~588~~ 9

THE YOUNGSTOWN SHEET & TUBE COMPANY,
APPELLANT,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER
OF OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED OCTOBER 30, 1957
PROBABLE JURISDICTION NOTED JANUARY 6, 1958.

Supreme Court of the United States

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IN SUPREME COURT OF OHIO

No. 34872

YOUNGSTOWN SHEET AND TUBE COMPANY, Appellee,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellant.

Appeal from the Board of Tax Appeals

EXCERPTS FROM MEMORANDA OF PLEADINGS, ETC. FILED, WRITS ISSUED, ETC., JUDGMENTS, ORDERS AND DECREES

Journal No. 42, page 242.

Appeal from the Board of Tax Appeals:

JOURNAL ENTRY OF JUDGMENT—January 30, 1957

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is reversed for the reasons stated in the opinion rendered herein.

Ordered, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

[fol. 3] Journal No. 42, page 259.

Rehearing Docket:

JOURNAL ENTRY OF ORDER DENYING REHEARING—February 20, 1957

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

[fol. 4] [File endorsement omitted]

[fol. 5]

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 34872

YOUNGSTOWN SHEET AND TUBE Co., Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 30, 1957

I. Notice is herewith given that Youngstown Sheet and Tube Co., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio reversing the Board of Tax Appeals of Ohio, such final judgment having been entered on January 30, 1957, and from the final judgment of the said Supreme Court of Ohio denying the appellant's application for rehearing entered on February 20, 1957.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in the cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1) A copy of the final determination of the Tax Commissioner.

2) A copy of appellant's notice of appeal from the Tax Commissioner's final determination, as filed with the Board of Tax Appeals.

3) A copy of the opinion of the Board of Tax Appeals of Ohio.

4) A copy of the notice of appeal from the Board of Tax Appeals, as filed with this Court on behalf of the Tax Commissioner.

5) A copy of the opinion of this Court.

6) A copy of the application for rehearing, as filed with this Court on behalf of the appellant.

[fol. 6] 7) A transcript of docket and journal entries of this Court in this cause, on the merits and on application for rehearing.

8) A transcript of all transcripts and evidence certified by the Board of Tax Appeals to this Court.

III. The following questions are presented by this appeal:

1. Do Sections 5709.01, 5711.01, and 5711.03, Revised Code of Ohio, as construed by the Supreme Court of Ohio, violate Article I., Section 10, Clause 2, of the Constitution of the United States, in that iron ores imported by appellant from foreign nations, and remaining in the original form as imported are subjected to Ohio personal property taxes?

2. Do Sections 5709.01, 5711.01, and 5711.03, Revised Code of Ohio, as construed by the Supreme Court of Ohio, violate Article I., Section 10, Clause 2, of the Constitution of the United States, in that iron ores imported by appellant from foreign nations, and remaining in the original form as imported, are subjected to Ohio personal property taxes if any portion of the ore is removed to a further storage point for eventual use by appellant in its processing operations?

3. Do Sections 5709.01, 5711.01, and 5711.03, Revised Code of Ohio, as construed by the Supreme Court of Ohio, violate Article I., Section 10, Clause 2, of the Constitution of the United States, in that iron ores imported by appellant from foreign nations and remaining in the original form as imported, are subjected to Ohio personal property taxes, if placed with prior imports of identical ores from which any portion has been withdrawn to a further storage

point for eventual use by appellant in its processing operations?

/s/ Carlton S. Dargusch, Attorney for Youngstown Sheet and Tube Co., Appellant, 33 North High Street, Columbus 15, Ohio.

[fol. 7] Proof of service (omitted in printing).

[fol. 8] Certificate of service (omitted in printing).

[fol. 10] [File endorsement omitted]

[fol. 11]

IN THE SUPREME COURT OF OHIO

YOUNGSTOWN SHEET AND TUBE CO., Appellant,

vs.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

CERTIFICATE OF SUPREME COURT OF OHIO AS TO CONSTITUTIONAL QUESTION—Filed May 20, 1957

On motion of appellant, Youngstown Sheet and Tube Co., the Court orders it to be certified and made a part of the record of the proceeding and of the judgment in this cause that the Tax Commissioner, by his appeal to this Court from the Board of Tax Appeals of Ohio, placed in issue the constitutionality of Sections 5711.03, 5701.08, 5709.01, and 5711.01 of the Ohio Revised Code, as to whether appellant's iron ore imports were taxable under those Sections, or protected therefrom by Article I, Section 10, Clause 2 of the United States Constitution as imports; that this Court, pursuant to appeal, and upon the record, briefs of counsel and oral argument, reversed the Board of Tax Appeals of Ohio, which had held that appellant's iron ore imports were protected from the application of the above Sections, and in turn held that the Sections did tax appel-

lant's iron ore imports; that upon consideration of the [fol. 12] same, the Court was of the opinion and accordingly decided, that the said Statutes were not invalid by reason of taxing appellant's iron ore imports and were not repugnant to the United States Constitution in so taxing; and that a determination of that question was appropriate and necessary to a decision in this case.

Witness the Honorable Supreme Court of Ohio, this 20 day of May, 1957.

Supreme Court of Ohio

/s/ Carl V. Weygandt, Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol. 14] BEFORE THE DEPARTMENT OF TAXATION

OPINION AND ORDER OF TAX COMMISSIONER—March 2, 1955

This proceeding being the application of The Youngstown Sheet & Tube Company, an inter-county corporation, Youngstown, Ohio, for review and redetermination of an increased tangible personal property tax assessment for the year 1954, after being duly heard, came on to be considered.

The applicant herein, a domestic corporation, in making its 1954 inter-county corporation return of taxable property, eliminated from the average value of its manufacturing inventories reported therein, an amount representing [fol. 15] the value of certain inventories of property owned by it and held in various storage facilities in this state for storage only: Upon audit, the average value of such excluded property consisting of, (a) iron ore at Lake Erie docks in Cuyahoga and Ashtabula counties, (b) iron ore, coal, scrap, limestone, fluor spar, ferros, and additions at the applicant's plant in Trumbull and Mahoning counties, and (c) finished seamless pipe at the applicant's plant in Mahoning county, was added back to the average value of manufacturing inventories as reported by the applicant. An increased assessment reflecting such action was issued for the year 1954.

The applicant filed this application for review and redetermination from such increased assessment, contending that the statutes purporting to levy a tax on merchandise held by it in storage facilities for storage only discriminate against it, and are, therefore, unconstitutional and void in that identical property, when held by a nonresident of this state for storage only, is excepted from taxation under the provisions of Section 5701.08, Revised Code, as construed in the case of The B. F. Goodrich Co. v. Peck, 161 Ohio St., 202.

Subsequent to the issuance of the increased assessment here in issue and prior to the hearing on this application for review and redetermination, an audit was made of the applicant's books and records. As a result of such audit, certain increases were proposed in the value of applicant's property taxable in Schedules 2 and 3. The applicant's objections to such proposed increases were raised and developed at the hearing, and, in substance, are as follows:

1. To the inclusion in Schedule 2, as a part of taxable construction in progress, of an account captioned "engineering expense" which account the applicant main- [fol. 16] tains, represents fees and expenditures for the preparation and supervision of the preparation of drawings, including plans, specifications and other detail incidental thereto, and their execution, which services applicant claims are exempt from taxation under Section 5701.03, Revised Code, and Goodyear Aircraft Corporation v. Peck, 162 Ohio St., 200.

2. To the inclusion in Schedule 3 of the value of iron ores imported by the applicant from various foreign countries which ores, the applicant maintains, are immune from state taxation under the provisions of Article I, Section 10, Clause 2 of the United States Constitution.

Being fully advised in the premises, the Tax Commissioner finds that as an administrative official, he is without authority to pass on the question of the constitutionality of the statutes here involved, such being the province of the courts alone. Cincinnati, W. & Z. R. Co. v. Clinton

County, 1 Ohio St., 77; State ex rel. Davis v. Hildebrant, 94 Ohio St., 154, 114 N. E. 55. Furthermore, the Tax Commissioner finds that as an administrative official, he must proceed in accordance with the terms and provisions of the statutes with which he is concerned with the assumption of their constitutionality. East Ohio Gas Co. v. Public Utilities Comm., 137 Ohio St., 225, 28 N. E. 2d 599; Argo v. Kaiser, 66 O. L. Abs., 538, 118 N. E. 2d 162. Thus, the Tax Commissioner finds no error in the assessment here under review since the property assessed is subject to taxation under the existing provisions of Sections 5701.08, 5709.01, 5711.03, 5711.22 and correlated sections of the Revised Code.

Being further advised, the Tax Commissioner finds that the item of "engineering expense" is not exempt from taxation as personal property under the applicable statutes or [fol. 17] the case of Goodyear Aircraft Corp. v. Peck, supra, and is, therefore, subject to taxation as a part of the value of personal property in the process of construction to which it relates.

With respect to the matter of import ores, the Tax Commissioner, being fully advised as to the facts incident to the importation and use thereof, finds that such ores have lost their identity as imports due to the fact that the import units thereof have been broken or mingled with domestic property. Thus, the Tax Commissioner finds that such ores are properly subject to state taxation. Hooven & Allison Company v. Evatt, 324 U. S. 652; 1946 O.A.G. 107.

Giving effect to the findings made herein, the Tax Commissioner finds that the true value of applicant's property taxable in Schedules 2 and 3 for the year 1954 is as follows:

Schedule	True Value
2	$44,733,598.00
3	28,800,157.00

It is, therefore, the order of the Tax Commissioner that a corrected assessment certificate be issued in accordance with the findings made in this journal entry. Such cer-

tificate shall be final with respect to the assessment of all taxable property listed in the applicant's return.

Department of Taxation

/s/ Stanley J. Bowers, Tax Commissioner.

[fol. 23]

BEFORE THE BOARD OF TAX APPEALS, STATE OF OHIO

OPINION AND ORDER—April 30, 1956

This appeal is from a review and redetermination of an increased tangible personal property tax assessment covering the year 1954, made by the Tax Commissioner, against the taxpayer on March 2, 1955.

The cause now comes on for further and final consideration upon the commissioner's transcript, appellant's notice of appeal, a stipulation of facts, the record of a hearing had on August 29 last, exhibits, and briefs of counsel.

Youngstown Sheet, a domestic corporation, in making its 1954 intercounty corporate return of taxable property, eliminated from the average value of its manufacturing inventories reported, certain inventories of property owned by it and held in various storage places in this state for storage only. The Tax Commissioner, in his final order now complained of, found these withheld inventories to be includable. The inclusion of these inventories within the average value of its manufacturing inventories reported, presents two of the three questions now made before this board on review. The third question had to do with the further inclusion of certain "engineering expense" within the tax base, which appellant contends is exempt from taxation.

We shall delay any further recitation of facts, and make note thereof in our consideration of the three respective errors complained of. The property of the taxpayer, withheld by it from the average value of its manufacturing inventories, and incorporated therein by the Tax Commissioner exclusive of "engineering expense", consists of iron ore at Lake Erie docks, iron ore, coal, scrap, limestone, [fol. 24] fluor spar stored at company plants in Trumbull

and Mahoning counties, held exclusively for future use, and finished seamless pipe held at its Mahoning plant for subsequent sale. Appellant says of this property, that:

> "Appellee erred in including, as taxable merchandise belonging to appellant and held for storage only in this state for the reason that like property belonging to a nonresident is excepted from taxation by Section 5701.08 of the Revised Code, and same section (and related sections), purporting to levy a tax on merchandise belonging to residents of this state and held for storage only, is, therefore unconstitutional and void in that it denies appellant the equal protection of the laws to which appellant is entitled under the Constitution of the State of Ohio and the Constitution of the United States."

Appellee, upon review, considered that this, being the property of a domestic corporation, was, under the statute, includable within the tax base, and since the question made was a constitutional one, and that he, as an administrative officer, was not empowered to consider the question of the constitutionality of a statute, and was bound to administer the statutory law as he found it. He had no other course but to do as he did, that is, include this property within appellant's average inventory base. The Board of Tax Appeals is likewise not invested with power to consider questions as to the constitutionality of a statute. Hence, it must follow that this board can do nothing more than affirm the Tax Commissioner on this phase of his order in the respect complained of, which is accordingly done. If appellant has been unjustly discriminated against, that is a matter solely for a court of competent jurisdiction to determine.

[fol. 25] Appellant in its brief in chief assumes that this board lacks jurisdiction to consider its question of inclusion of imports in its average taxable inventory because it presents a constitutional question. The Board of Tax Appeals does not subscribe to this view. True, the answer to this question is to be found in the federal Constitution and adjudications of the federal courts; but, as we see it, the

board is not required to declare a state statute in conflict therewith and therefore unconstitutional. We do not believe that any pertinent state statute conflicts with Article I, Section 10, Clause 2 of the federal Constitution. Appellee briefs this issue in its answer brief.

Revised Code Section 5709.01 provides in part, that

> "All personal property located and used in business in this state, * * *, are subject to taxation, * * *."

Revised Code Section 5711.01 reads in part, that

> "(A) 'Taxable property' includes all the kinds of property, * * *, mentioned in sections 5709.01 and 5709.02 of the Revised Code, * * *."

Revised Code Section 5711.03, which provides for the listing of taxable property, contains this provision:

> "Except as provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, all taxable property shall be listed as to ownership or control, valuation, and taxing districts * * *."

These Code provisions appear to be the only sections thereof that could possibly be in conflict with the federal constitutional provision. We make the following observations. The General Assemblies of Ohio were unquestionably familiar with the constitutional provision. They legislated with that thought in mind. Note that Revised Code Section 5709.01 reads, "all personal property *located and* [fol. 26] *used in business* in this state". Is this imported property located in Ohio? Had it on tax listing date become a part of the general mass of personal property in this state? These two questions must be answered in the negative unless the facts disclose that these ores were not then in the hands of the importer or had ceased to retain their import character. The federal laws and cases relating to interstate commerce, and particularly those provisions relating to taxation of goods in transit, closely parallel the rules of taxation governing imports. No one can successfully maintain that goods in transit in interstate commerce, or temporarily delayed within a state, may be

locally taxed. Yet such goods are then at least temporarily located within a state. Clearly the words used in Revised Code Section 5709.01 were intended to embrace only goods that had permanently found location in Ohio, and that had become a part of the general mass of property in the state, and devoted to business therein.

As said in Orphans' Asylum v. Board of Tax Appeals, 150 O. S. 219, it is this board's mandatory duty to see to it that no taxable property escape taxation, and that no property entitled to exemption from taxation be unlawfully taxed. True that was said in a real property exemption matter, however, the same is equally true of personal property. The court held that this board had jurisdiction therein and should have exempted the property under the provisions of a prior statutory contract and Trustees of Dartmouth College v. Woodward, 17 U. S. 518, 4 L. Ed. 629.

Any number of cases involving imports have been considered by both state and federal courts. The law as expounded by the federal courts is fairly well established. [fol. 27] We shall seek to follow the interpretation by federal courts as it pertains to taxation of imports.

The second question presented by appellant has to do with a portion of appellant's property held in storage. This property consists of imported ores. During the year covered by its 1954 tax return it held the following average monthly imported ore inventory during 1953:

Grade	Imported From	Average Inventory Value
(1) Brazilian Ore	Brazil	$ 503,161.39
(2) Cuban Ore	Cuba	34,571.46
(3) Mexican Ore	Mexico	58,345.68
(4) Liberian Ore	Liberia	5,367.52
(5) Seine River Ore	Canada	791,786.82
	Total	$1,393,232.87

Appellant purchased and imported these 5 grades of ore, the first 4 grades for use in its open hearth furnaces, the fifth grade for use in its blast furnaces. This ore was not

purchased for resale. It was loaded in bulk in foreign ports into chartered vessels which carried but a single cargo and a single grade of ore. When the vessels reached a port of entry the ore was discharged from the vessel into railroad cars and transported in bulk by rail from port of entry to Youngstown, Ohio. Upon arrival in Youngstown the railroad cars were spotted at one or more of appellant's storage yards and there unloaded into separate storage piles and held for subsequent use as needed. A separate storage pile is maintained for each grade of imported ore and such ore is not commingled or mixed with other property of the taxpayer. These stock piles of separate grades of ores are located some distance from stock bins and furnaces. When the need arises for ore of a particular grade [fol. 28] it is taken from the particular grade stock pile, transported to and placed in the stock bins. When a subsequent shipment of bulk ore of the same grade is received it is placed in that grade's stock pile; that is, all imports of Brazilian ore were placed in the Brazilian stock pile, Cuban ore in the Cuban stock pile, Mexican ore in the Mexican stock pile, Liberian ore in the Liberian stock pile, and Seine River ore in the Seine River stock pile. Hence, a stock pile of a particular grade may be diminished by a day's need and augmented the next by subsequently imported ore of the same grade. At all stages these ores are loaded, imported, reloaded into railroad cars and unloaded into grade stock piles and then reloaded and taken to stock bins as needed in bulk. It sought at all times to have a three months' supply of all grades of imported ore on hand.

At this point we wish it to be distinctly understood that this issue is presented on an agreed stipulation of facts. It will be decided strictly upon those facts. Such facts as are hereinbefore stated are taken directly from the agreed stipulated facts.

The taxpayer concedes that these imported ores lose their immunity from state taxation when they are removed from storage piles and placed in the stock bins, but insists that so long as these ores remain in their separate stock piles the state may not tax these imports. Appellant grounds its claim on Article I, Section 10, Clause 2 of the Constitution of the United States and various causes de-

cided thereunder. The constitutional provision provides as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

[fol. 29] The question made calls for determination of two issues of fact. First, was the appellant the importer of these bulk iron ores? Second, whether or not these bulk ores, when received in Youngstown and placed in stock piles of the particular grade set apart for each respective grade and not mixed with other ores of different grades, and ores were taken therefrom as needed, and like grade of ore was subsequently added thereto, lost their distinctive character as imports, and have become subject to the taxing power of the state of Ohio. If the first query be answered in the negative, the second query becomes immaterial.

The facts of this case, as to how and in what manner, this ore was purchased, delivery made and payment effected, hardly need further comment other than to say that they are in substance parallel with those found in Hooven & Allison Co. v. Evatt, 142 O. S. 235, which was reversed by the United States Supreme Court. See 324 U. S. 652, 89 L. Ed. 1252. The dissenting opinion of Judge Bell in the state report, and the opinion of Chief Justice Stone in the federal report, set forth at length the conclusion of fact and law applicable thereto more succinctly, perhaps, than this board could do. Appellant, from the contracts of purchase of these ores in evidence, clearly appears to have procured the importation of these ores, and even though channeled through brokerage firms, it accepted title to these ores when loaded on board ship at the foreign port of shipment. Appellant then made payment of the major portion of the purchase price. It caused and paid import duties and charges, marine insurance covering these cargoes and other transportation charges. The brokerage firms simply acted as agents and facilitating mediums through which these contracts of purchase and sale were [fol. 30] effected. The buyer at all times appears to have been Youngstown Sheet and Tube. Upon the facts present

we do not consider that it can be successfully maintained that appellant was not the importer of these ores.

The second query presents a far more difficult question, and one which may, on completion of the Seaway Canal to the Great Lakes and importation of Labrador ore, be of vital interest to Ohio's courts and industry. Had these ores lost, by the manner of their handling, their import character? If we were here dealing with, let us say, sugar imported in bags, in cargo lots and stock piled in warehouse, the solution of the question would be simplified. Carrying the illustration further, if 5,000 bags of sugar were contained in one shipment and stored for subsequent use or sale in warehouse, and the next day 500 bags were removed therefrom for use or sale, and the day following a second cargo of 5,000 bags of like kind and quality was received and added to the stock pile, there would unquestionably remain in the original containers in the stock pile 9500 bags of imported sugar. In the present case we are dealing with an imported commodity that economically, commercially and practically, cannot be packaged, but must be purchased in bulk in boat cargo or railroad car lots. Unlike sugar, its bulk and indestructibility from weather economically requires and permits its storage in open air stock piles. If we adopt the figures above used in the sugar illustration and denominate the bags as tons, we have 9500 tons of iron ore of a particular grade and kind remaining in the particular stock pile.

The exceptional men who produced the constitution, and the particular provision drawn in question could readily visualize, or had already experienced, that certain com- [fol. 31] modities would be imported in bulk which were not susceptibible (sic) of packaging. Hence, they generally provided that no state should lay imposts or duties on imports until that property had lost its import character. They did not limit the provision's applicability to packaged imports. They knew that metals were extracted from bulky ores and that such would probably be imported. Since that period numerous other products, such as petroleum, oils, gasoline, bananas, lumber, guano, phosphate, limestone, and other commodities are now imported in bulk lots, due to a like inability to economically package them.

The earliest and still the leading case, on interpretation of the constitutional section in issue, is that of Brown v. Maryland, 25 U. S. 419, 6 L. Ed. 678, in which Chief Justice Marshall says:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In a later case, said to be the leading "original package" case, Low v. Austin, 80 U. S. (13 Wall.), 29, 20 L. Ed. 517, Justice Field makes these two observations:

> "Indeed goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State Government.
>
> [fol. 32] "Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the State."

From report of what are known as the "License Cases", Thurlow v. Mass., Fletcher v. R. I., Peirce v. N. H., 46 U. S. 504 (see 575), 12 L. Ed. 256, we learn that Chief Justice Taney argued for the state in Brown v. Maryland, supra, and that he thereafter sustained a change of mind. He therein concludes:

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense

be regarded as part of the mass of property in the State usually taxed for the support of the State Government."

Examination of numerous cases discloses that since decision of Brown v. Maryland, supra, and the "License Cases", there has been developed what is termed the "original package" theory. In Washington Chocolate v. King County, 21 Wash. (2d) 630, is found a well considered case in which many authorities are reviewed. Imports in this case were packaged articles. Its second syllabus succinctly sets up three situations developed by that theory:

"Imported merchandise loses its constitutional immunity from state taxation,

"(1) When it is no longer in the original package;

"(2) When the importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state; and

"(3) When it has been sold by the original importer to a purchaser, even though it remains in the original package."

We can find no fault with these conclusions. The question, however, which troubles us is: Whether or not im- [fol. 33] ports in bulk, not susceptible of packaging, which constitute the entire cargo of the ship transporting the commodity to the port of entry, become subject to state taxation when unloaded from the ship. In answering this query, we have confined ourselves particularly to the only available reported decisions findable that had such bulk question squarely before them.

In Mexican Pet. Corp. v. City of S. Portland, 121 Me. 128, 115 Atl. 900, 26 A. L. R. 965, we find a case of bulk importation of oil decided upon the "original package" theory. Its syllabus holds:

"Oil imported in tank steamers and pumped into receiving tanks belonging to the importer, for distribution by the owner of the tanks, has lost its char-

acter as an import and becomes subject to local taxation."

If this be a correct solution of that case, then by the same reasoning, the act of unloading any like bulk import is a severance of the import from the original package, which is the ship, and the import becomes a part of the general mass of property and loses its constitutional immunity the instant it is unloaded and enters the country. This is not true, however, under the original package theory if the commodity imported is packaged in containers. It does, therefore, appear, under the reasoning of the Maine case, that packaged imports are favored and have a preference over goods imported in bulk. We do not think that the constitutional inhibition made any such distinction. The court, in its next to the last paragraph of the Maine case, notes that at least two justices of the Supreme Court of New Jersey, in a nonreported case, under identical facts, are opposed to the Maine court's judgment.

[fol. 34] Reverting to the case of Brown v. Maryland, supra, it must be noted that Chief Justice Marshall refrained from defining the term "original package", and went on to hold that goods "while remaining the property of the importer, in his warehouse, *in the original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." It is also again noted that Chief Justice Taney in "License Cases", supra, drops out the word "package" and employs only the term "*the form and shape*" in which they, the goods, are brought into the country. Justice Field, in the leading "original package" case, Low v. Austin, supra, adopts Taney's exact wording.

Four more recent authorities which have to do with importation of bulk ship cargo imports strongly commend themselves to us. All four causes note the Maine case, supra, and disagree with its conclusion. In, re Taxes Pacific Guano & Fertilizer Co., 32 Hawaii, 431 (441), the Supreme Court of the Territory says and holds:

"The phosphate rock was brought in ships in bulk. It could not have been stored in original packages, for

it did not come in any package whatever. It would be an undue stretch of language to say that the ships were the original package. The test as to 'original packages' does not apply in such cases. The phosphate rock, within the decision in the Maryland case, was in the warehouse of this taxpayer in the 'original form' in which it was imported, that is, it was in bulk, it was being kept in the warehouse in bins separate from the general mass of property in this Territory."

The second case is that of Galveston v. Mexican Pet. Corp., 15 Fed. (2d) 208. The court's opinion states that

[fol. 35] "Oil brought from Mexico, not for general and indiscriminate sale, but to fill contract already made, retains its character as import, not subject to local taxation, though some small quantities were sold locally, when pumped into tanks from steamers from which it was shipped."

The third case is that of Philippine Refining Corp. of N. Y. v. County of Contra Costa, 24 Cal. App. (2d) 665, its syllabus reads:

"Where an importer of coconut oil from the Philippine Island, having a place of business in another state, conducts such business by aggregating orders sufficient to fill a tank or tanks in a steamer and, upon arrival of the oil at the point of transshipment in this state, it is placed in temporary storage facilities, from which it is then taken and delivered, in the form in which it arrives, but in agreed quantities, to the buyers throughout the United States, pursuant to the orders theretofore made, and none of the oil in such storage facilities is held for indiscriminate sale, or for any purpose other than solely incidental to its transportation to the prior purchasers, said oil is not subject to local taxation, and local taxes paid thereon under protest may be recovered as being in violation of article I, sections 8 and 10, of the federal Constitution."

The fourth case is that of Mexican Petroleum Corp. v. Louisiana Tax Commission, 173 La. 604 (see 614), 138 So.

117. This case deals with Mexican crude oil imported in tankers. When it reached the port of entry, it was heated to make more ductile and pumped into land storage tanks. Of the state's right to tax this import, the court says and holds:

> "It is obvious, under the authorities cited, and especially under Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095, that, because the [fol. 36] oil came to a state of rest at Destrehan to be there refined, it did not lose its character as an import. A more important question concerns the manner of importation. Our appreciation of Brown v. Maryland, and the authorities cited, resting upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the manner of importation, it suffices that the import, to retain its character as such, remain in the original form in which imported. Some property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages. It was not the intention, however, to exclude such property from the immunities of imports. Of this nature is crude oil. The only practical way of importing it is in bulk. To import it in barrels would make the oil too costly to be used in general commerce, whether for heating purposes, or for the manufacture of important articles of gasoline, kerosene, asphalt, or other products. It is obvious that to deprive such importations of their immunities as imports would be a blow to the great oil industry, and, as a result, to the people thereof. The import clause of the Constitution was not so intended or designed."

Another case of interest is that of Southern Pacific Co. v. City of Calexico, 288 Fed. 624 (642). Although it has to do with importation of baled Mexican cotton, which had to be recompressed before shipment to England, the court states that in such cases:

> "The controlling question is: Was the property kept segregated from the general mass of property in the

state in such a way that it could always be identified, and not subject to any beneficial use?" (Such as hypothecation, which the court had in mind.)

We think it well to make some comment on the case of Sonneborn v. Cureton, supra. This was an original pack- [fol. 37] age interstate commerce case, and not one of foreign bulk importation. It is here important for two reasons. Chief Justice Taft therein succinctly sets forth the reasons that lie behind the difference in the rule applicable in interstate commerce transactions from that of foreign importations, as they apply to goods in their original package. At page 1098 of the Law Ed. report appears the following further pronouncement:

> "It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it."

The questions presented by appellant's second claim of error, that is, the matter of the taxability of bulk importations, have been previously inquired into by the old Tax Commission and the Tax Commissioner of Ohio. In fact, the attorney general has twice been called upon for his opinion in such instances. See Attorney General's Opinions of 1928, Vol. 1, page 141, and of 1946, page 107. In the 1928 opinion the attorney general considered that flaxseed imported in bulk, for use by the importer in the manufacture of finished products, elevated from a ship's hold into large bins, from which the importer from time to time took sufficient flaxseed to supply its present needs as production required, lost its distinctive character as an import (the residue in bins) by reason of such withdrawals. In the second opinion a succeeding attorney general modifies his predecessor's views. We quote from the second opinion inasmuch as it raises the point here in issue which we think to be a vital point in this controversy.

> "The importer should enjoy tax immunity for his imported goods so long as he retains them as undis-

[fol. 38] turbed units. In Hooven & Allison Company v. Evatt, 324 U. S. 652, 89 L. Ed. Advance Opinions, 852, Mr. Chief Justice Stone in his opinion said:

"'Plainly if and when removed from the package in which they are imported, or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end.

"'If the imports be packaged goods, the package is the unit which must remain unbroken and used. If they be unpackaged, then the rule should remain the same with respect to each unit. In the case of fungible goods shipped in bulk, the better rule would seem to be that we regard the entire quantity of each person's importation or any separated unit thereof as the unit that must not be divided, mingled or otherwise used if tax immunity is to be retained. The vital factor seems not to be the breaking of a package, but the breaking up of an imported unit, the mingling of the whole or any part thereof with domestic property, or the use of the whole or any part of a unit. Hooven & Allison Company v. Evatt, supra.

"'If this test be applied to the 1928 Attorney General's Opinion, the conclusion reached therein is sustained, for the form of the import is changed by using parts of the imported units from time to time in manufacturing.'"

As we read the excerpt taken from the Hooven & Allison case, we remember that the court therein was considering packaged goods, and of course if a package was opened and a part of its contents was used for the purpose for which it was imported, the balance of the goods in that package lost its identity as an import; but we do not understand that Chief Justice Stone was saying that all other units or all other originally packaged goods in the import thereby lost their import identity. This manner of reasoning would lead to the inconsistent conclusion that if one [fol. 39] bag of sugar in an import of 500 bags is sold or consumed, that the remaining 499 bags thereby become subject to state taxation because the unit import has been destroyed. To our notion this is a complete departure from

the original package theory, and attempts to create a new yardstick in its stead, that of "breaking up of an imported unit". Certainly, it disregards the rule of Brown v. Maryland which still appears to be the law of the land. The bulk importer would have but one recourse. He must sell or consume his entire ship's cargo in a single transaction or one operation. This newly conceived theory has one advantage. It would permit state taxation of that which the constitutional provision prescribes shall not be taxed. It further strikes us that if the Maine case, supra, is rightly decided, it effects the very practice which induced adoption of the constitutional provision, and that which it sought to prohibit, to wit, the taxing of an import by the state having the port of entry within its border of imports destined for use and consumption in an interior state. This practice was then a very live issue. See Federalist Papers and Madison's Notes.

The rule, as we understand it, is that as found in the second, eighth and tenth syllabi of Hooven & Allison Co. v. Evatt, supra:

> 2. "The prohibition in Article I, Sect. 10, Cl. 2, of the Federal Constitution of state imposts or duties on imports necessarily extended to state taxation of things imported after their arrival, so long as they retain the character of imports and have not become a part of the common mass of property within the state.
>
> 8. "A manufacturer's stock pile of imported materials, stored in the original packages in a warehouse at [fol. 40] the factory pending use in the manufacturing process, retains the character of imports entitled to constitutional immunity from state taxation.
>
> 10. "Imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported, or when the original packages in which they were imported are broken."

We find no authority, dealing with importations in bulk, that approves of the Maine court's reasoning and conclu-

sion save and except that of Tres Ritos Ranch Co. v. Abbott, 44 N. M. 556, 105 P. (2d) 1070, 130 A. L. R. 963, which is readily distinguishable upon the determining factors that the imported cattle were no longer in the same form and had been commingled with the general mass of property in the state. The court also found as a matter of fact that the Ranch Company was not the importer, which could easily have been dispositive of the appeal. Although the Maine court grounds its conclusion on the opinions of Marshall, Taney and Field, it rests squarely upon the hypothesis that there is but a single test in all cases, that being the "original package" theory. It entirely disregards that portion of those opinions which speak of *"the original form or package"*. The Supreme Court of the United States has not as yet held that the "original package" theory is the one and only test whether the import be packaged or *in bulk*. We feel that the Maine court, in its zeal to see that no property of a taxable class within its borders shall escape state taxation, adopts the only theory upon which the questioned property could be locally assessed.

[fol. 41] It was never intended that packaged imports should have a preference over bulk imports, and that the latter, because of their weights and quantities, were not within the constitutional prohibition. It is fairly obvious that it would be rather absurd to require an importer of goods to stockpile each identical merchandise importation separately. If he received a hundred identical shipments must he then have a hundred separated places of storage for the same identical article? We think not. Because perishable goods require inside storage, it does not follow that bulky nonperishable imports must be stored inside or under cover. To do so in many instances would entail prohibitive expenditures. If one may remove 500 bags of stored imported sugar from a storage warehouse, it would not follow that the 4500 bags left in storage of a 5,000 bag importation would destroy the import character of the 4,500 identical bags left remaining in storage. Neither do we see how the remaining stored imported sugar's import character would be destroyed by augmenting the stock pile by a second importation of identical sugar. What is true of sugar is equally true of imported ore in bulk. There is

no mixing of grades, kinds or quality. Its import identity is undisturbed. The quantity always present in the stock pile is as susceptible of mathematical computation on a per ton basis as are the number of bags of sugar in the stock pile.

Appellee, in the course of his answer brief, refers to two cases, one of which is F. May & Co. v. City of New Orleans, 178 U. S. 496, 44 L. Ed. 1165. This case is one dealing with whether or not the box or contained (sic) in which the foreign producer packaged the imports, or the individually packaged articles contained within the box or container, [fol. 42] were the "original package" and when broken the separately packaged imports contained therein lost their import character.

The second case advanced is that of E. J. Stanton & Sons v. County of Los Angeles, 78 Cal. App. (2) 181, 177 Pac. (2) 804. This we have carefully examined as well as the same court's earlier case of Dant & Russell, Inc. v. Bd. of Sup'rs. of Los Angeles Co., 128 P. 2d, 389. It is difficult to harmonize these two decisions. We do note the following pronouncements made in the Dant-Russell case:

> "The law is settled that a state or a subdivision thereof may not constitutionally levy a tax upon a thing during the time it retains its character as an import and remains the property of an importer in a warehouse in the original form or package in which it was imported.
>
> "The case of Mexican Petroleum Corp. v. City of South Portland, 121 Me. 128, 115 A. 900, 26 ALR 965, cited by respondent and apparently strenuously urged in the trial court, which reaches a contrary conclusion has been expressly disapproved as the law of this state. (See Philippine Ref. Corp. v. Contra Costa County, 24 Cal. App. 2d, 665, 669, 76 P. 2d, 163."

The Board of Tax Appeals, therefore, determines that the imported ores included by the Tax Commissioner within the average monthly inventory base should not have been included therein. In so doing the commissioner erred.

The constitutional issue of storage discrimination is affirmed for want of jurisdiction. The Tax Commissioner's order respecting the inclusion of imports in average monthly inventory values is reversed. The commissioner's order respecting engineering expense is affirmed.

[fol. 61] IN THE SUPREME COURT OF OHIO

Case Nos. 34868
34872

OPINION—Decided January 30, 1957

Taxation—Imported Fungible Commodity—Protection from State Tax Not Extended, When—Iron Ore—Personal Property Defined—Section 5701.03, Revised Code—"Drawings" Construed—Value for Tax Purposes Determined, How—Cost in Preparing Drawings Included in Book Cost of Construction Projects—Deduction Therefrom of Value of Drawings—Appeal from Tax Commissioner to Board of Tax Appeals—Sufficiency of Evidence to Sustain Order.

1. If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, such protection cannot extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing.

2. The word "drawings" as used in Section 5701.03, Revised Code, does not necessarily include specifications relating to drawings.

3. Even though the cost of drawings does not determine their true value for personal property tax assessment pur-
[fol. 62] poses, such cost is some evidence of such value at least at a time while the items to which such drawings relate

are being constructed and before the completion of those items.

4. Where a substantial cost in preparing a substantial number of drawings is included in the book cost of certain construction projects and where such book cost of such construction projects is taken as the value of those projects for personal property taxation purposes without any deduction therefrom for the value of such drawings, the Tax Commissioner cannot avoid the provisions of Section 5701.03, Revised Code, relating to "drawings" merely by arguments that he is only taxing the construction projects and that the books of the taxpayer show everything that is taxed as allocated to the cost of those projects.

5. Where the record on appeal to the Board of Tax Appeals from an order of the Tax Commissioner contains substantial evidence supporting the claim of the taxpayer, the order of the commissioner, to be sustained, must be supported by something more than a mere presumption in its behalf. (Paragraph three of the syllabus of *Block* v. *Glander, Tax Commr.*, 151 Ohio St., 381, approved and followed.)

Appeals from the Board of Tax Appeals.

The Youngstown Sheet & Tube Company, herein referred to as the taxpayer, is an Ohio corporation. In its 1954 return, it eliminated from the average value of its reported [fol. 63] manufacturing inventories certain inventories of property owned by it and held in various storage places in Ohio. The Tax Commissioner in his final order found these withheld inventories to be taxable. Furthermore, the Tax Commissioner in that order made no deduction from the tax base of any amount on account of "drawings" which the taxpayer claimed to be exempt from taxation.

On appeal to the Board of Tax Appeals, that board affirmed the orders of the Tax Commissioner so far as it related to the "drawings." With respect to the property held in storage, the taxpayer had contended that that provision of Section 5701.08, Revised Code, which, prior to September 30, 1955, read, "but merchandise * * * belonging to a nonresident of this state is not used in business in

this state if held in a storage warehouse for storage only," should have stricken therefrom the words "belonging to a nonresident of this state" for the reason that those words made such provision unconstitutional and that such provision when so revised excepted such property from taxation. The Board of Tax Appeals determined that it had no power to determine that any part of Section 5701.08, Revised Code, was unconstitutional and that it was therefore bound to render its decision in accordance with the provisions of that statute as it found them.

The taxpayer further contended that certain iron ores imported by it from foreign countries were exempt from taxation by reason of the provisions of Clause 2 of Section [fol. 64] 10 of Article I of the Constitution of the United States. This contention was sustained by the Board of Tax Appeals.

The cause is now before this court on appeals by the Tax Commissioner and by the taxpayer from the decision of the Board of Tax Appeals.

OPINION: TAFT, J.

For the reasons stated in *Allied Stores of Ohio, Inc.* v. *Bowers, Tax Commr., ante,* 116, the taxpayer's contentions with respect to property held in storage must be rejected, except to the extent that the property so held represented iron ores imported by the taxpayer from foreign countries.

As to such iron ores, the claim for tax exemption is based upon that provision of Clause 2 of Section 10 of Article I of the Constitution of the United States which reads:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * *."

That constitutional provision has been applied so as to prevent a state tax on property imported from outside the United States so long as it remains in the original package. *Hooven & Allison Co.* v. *Evatt, Tax Commr.*, 324 U. S., 652, 89 L. Ed., 1252, 65 S. Ct., 870; *Brown* v. *Maryland*, 12 Wheat., 419, 6 L. Ed., 678; *Low* v. *Austin*, 13 Wall., 29, 20 L. Ed., 517.

However, where the original package in which property was so imported has been broken, it has been held that [fol. 65] the foregoing constitutional provision does not prevent imposition of a state tax upon the property which had previously been imported. *May* v. *New Orleans,* 178 U. S., 496, 44 L. Ed., 1165, 20 S. Ct., 976.

In the instant cases, it is not necessary to determine whether commodities, which are usually imported in bulk as is iron ore, may ever be exempt from state taxation by reason of that constitutional provision after such commodities have been taken from the ship or vessel that carried them to this country. Cf. *Mexican Petroleum Corp.* v. *City of South Portland,* 121 Me., 128, 115 A., 900, 26 A. L. R., 965, and *Tres Ritos Ranch Co.* v. *Abbott, Treas.,* 44 N. Mex., 556, 105 P. (2d), 1070, 130 A. L. R., 963, with *In re Taxes Pacific Guano & Fertilizer Co.,* 32 Hawaii, 431, and *Mexican Petroleum Corp.* v. *Louisiana Tax Commission,* 173 La., 604, 138 So., 117.

Although it does not appear that the Supreme Court of the United States has ever been called upon to determine when fungible goods, such as iron ore, cease to be imports within the meaning of the foregoing constitutional provision (see annotation, 89 L. Ed., 1279, 1284 *et seq.*), that court has by its five to four decision in *May* v. *New Orleans, supra,* provided some guidance with respect to that problem. In that case, it was held that, where goods were packaged in small packages by a manufacturer and then packed in a larger package for shipment, such goods, although still in the unbroken smaller packages, were subject to state taxation as soon as the large shipping package had been broken. [fol. 66] In the opinion by Mr. Justice Harlan it is said:

> "* * * the question in the present case is whether the plaintiffs, prior to the assessment complained of, had *so acted upon* the goods imported by them as to incorporate them with the mass of the property in the state, and bring them, while in their possession, within the range of local taxation.
>
> "* * *
>
> "* * * the 'original package' in the present case was the box or case in which the goods imported were

shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

In the instant cases, it appears from the agreed statement of facts that the taxpayer imported iron ores from five different countries; that these ores were purchased for use in the taxpayer's furnaces; that the taxpayer *maintained a supply* of each of these "ores *sufficient to meet* its *estimated requirements for* * * * *at least three months*"; that these ores were moved into a port of entry on vessels, each of which carried only one particular grade of ore; that, at the port of entry, the entire cargo of ore from a particular vessel was discharged into railroad cars and transported in bulk to a *storage yard* in Youngstown, Ohio, *adjacent to the taxpayer's manufacturing facilities;* that there it was unloaded and placed in a separate storage pile in a separate area of the ore yard; that "a separate [fol. 67] storage pile was maintained for each" of the five grades of imported ore and no such grade of ore was mingled with other ore or property "except that *different vessel shipments* of * * * ore" from a particular country *"were piled* * * * *on top of* * * * *other" ore* from that particular country *"as such* additional *shipments arrived";* and that "from time to time, *as needed, a portion* of the * * * ore *in each* separate *storage pile was removed* from such pile and transported to * * * stock bins" or "stock houses * * * for use in * * * furnaces * * * of the" taxpayer.

If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, we do not believe that such protection can extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing.

If, as held in *May* v. *New Orleans, supra* (178 U. S., 496), goods still in their original manufacturer's package are taxable notwithstanding Clause 2 of Section 10 of Article I of the Constitution of the United States, if they were shipped in a larger package and the larger package has been broken, we cannot comprehend how a shipment of iron ore shipped and received in this country in one vessel can [fol. 68] be regarded as non-taxable by reason of that constitutional provision (1) after it has been mixed with other ore received from another vessel and (2) after part of such iron ore has been separated from the whole for use in manufacturing.

The taxpayer's complaint with respect to the failure of the Tax Commissioner to make any deduction from the tax base of any amount on account of "drawings" is based upon Section 5701.03, Revised Code, which, prior to October 4, 1955, read so far as pertinent:

> "* * * 'personal property' includes every tangible thing which is the subject of ownership * * * other than patterns, jigs, dies, drawings * * *."

The taxpayer's evidence as to the value of "drawings" is largely evidence as to the cost of drawings *and specifications*. The evidence in the record does not require the conclusion as a matter of law that the specifications referred to in this evidence of cost were part of the drawings. Actually, there is much that would support a conclusion that, although related to the drawings, the specifications were not a part of the drawings; and the Board of Tax Appeals apparently reached that conclusion. The statute relied on does not use the word "specifications."

However, the evidence does show conclusively that there were a very substantial number of drawings. Also, there is evidence disclosing that both the cost of such things as some of the "tracings, blueprints and supplies" and also the charges for some of the "detail draftsmen and tracers" amounted to several thousands of dollars. Without suggest- [fol. 69] ing that there is no other evidence as to value or cost of the drawings, we believe that anyone will concede that these items represented part of the cost of these draw-

ings. Even though the cost of drawings does not determine their "true value" for tax assessment purposes (see Sections 5711.21 and 5711.18, Revised Code), such cost is some evidence of such value, at least at a time as here while the items to which they relate are being constructed and before the completion of those items.

Notwithstanding the foregoing evidence as to the inclusion of a substantial cost in preparing a very substantial number of drawings in the book cost of the construction projects, which was taken as the value of those projects for taxation purposes, no deduction at all from that book cost was made for the value of "drawings." In such an instance, the Tax Commissioner cannot avoid the provisions of the statute relating to "drawings" by arguments that he is only taxing the construction projects and that the books of the taxpayer show everything that is taxed as allocated to the costs of those projects. Such arguments were rejected by this court in *Goodyear Aircraft Corp.* v. *Peck, Tax Commr.*, 162 Ohio St., 200, 122 N. E. (2d), 700.

As stated in paragraph three of the syllabus of *Bloch* v. *Glander, Tax Commr.*, 151 Ohio St., 381, 86 N. E. (2d), 318:

> "Where the record on appeal to the Board of Tax Appeals from an order of the Tax Commissioner contains substantial evidence supporting the claim of the appellant, the order of the commissioner, to be sustained, must be supported by something more than a mere presumption in its behalf."

[fol. 70] It follows that as to case No. 34872 the decision must be reversed and that as to case No. 34868 it must be affirmed except to the extent that it relates to the claimed deduction from the tax base on account of "drawings," and the cause is remanded to the Board of Tax Appeals for further proceedings.

Judgments accordingly.

WEYGANDT, C.J., ZIMMERMAN, BELL, MATTHIAS and HERBERT, JJ., concur.

STEWART, J., concurs except as to that portion of paragraph one of the syllabus between "(1)" and "(2)".

[fol. 71]

IN THE SUPREME COURT OF OHIO

Case No. 34868
34872

APPLICATION FOR REHEARING—Filed February 13, 1957

Youngstown Sheet & Tube Co., appellant in case No. 34868 and appellee in case No. 34872, applicant herein, respectfully requests rehearing of those cases for the following reasons:

First, rehearing on the issue of storage only is requested for the same reasons set forth in the application for rehearing in *Allied Stores of Ohio, Inc.* v. *Bowers*, 166 Ohio St., 116, filed this day by Allied Stores of Ohio, Inc.

Second, rehearing on the issue of applicant's imports is requested for the reason that the decision discriminates against bulk imports of iron ore by holding that any withdrawal from such imports destroys the exempt character of both. If this rule were to prevail and be applied consistently it would mean that packaged imports have a preferred status over fungibles. No court has held that the withdrawal of some packages from a shipment renders the entire shipment taxable, or that the co-mingling of separate shipments of packages impairs the immunity of the whole. Had applicant bailed, sacked, or in another way "packaged" its ore imports, removal of a number of packages would not alter the status of the rest, nor would co-mingling. No apparent reason presents itself for a different conclusion when the equivalent of several packages of ores is [fol. 72] taken away from an ore pile or added thereto.

Third, the decision uses the analogy of breaking a larger package, citing *May* v. *New Orleans*, 178 U. S., 496, 44 L. Ed., 1165, 20 S. Ct., 976. But that case did not hold, as the Court here does, that the whole shipment was a package, or that the shipment was made taxable by the breakage.

Fourth, the decision does not follow the case nearest the instant on the facts, *Hooven & Allison Co.* v. *Evatt, Tax*

Commissioner, 324 U. S. 652, 89 L. Ed. 1252, 65 S. Ct. 870, wherein the Supreme Court held that goods were entitled to exemption as imports until they were changed in form by introduction into the stream of manufacture. Under that holding appellant would be entitled to relief if it could have shown some kind of packaging, but presumably, absent such packaging it must be subjected to greater and disproportionate tax burdens.

Fifth, the underlying policy in all cases of conflict between federal and state jurisdiction is to achieve a balance of interests. By holding that all applicant's imports, including those still in storage in the yards, are taxable, the decision departs from this policy. State jurisdiction to tax is accorded prevailing weight over the constitutional prohibition.

For the reasons stated above, applicant respectfully requests that the court grant rehearing for the purposes of reconsidering its decisions in case No. 34868 and case No. 34872.

/s/ Carlton S. Dargusch, Sr., /s/ Jack H. Bertsch,
Attorneys for applicant.

[fol. 73]

BEFORE THE BOARD OF TAX APPEALS, DEPARTMENT OF TAXATION, STATE OF OHIO.

Case No. 34872

STIPULATION OF FACTS—Filed August 18, 1955

It is stipulated and agreed by and between counsel for the respective parties hereto that the following stipulation may be considered as the facts for all purposes pertinent to the consideration and decision of the above case, subject, however, to the right of either party to offer additional evidence concerning engineering expenditures including the value of drawings, specifications and other detail incident thereto.

1. The Youngstown Sheet and Tube Company, Appellant herein, is a corporation organized and existing under and

by virtue of the laws of the State of Ohio, with its principal office located in the Stambaugh Building, Youngstown, Ohio, and with plants for the manufacture of iron and steel (including products) in Mahoning and Trumbull Counties, Ohio. Exhibits A and B attached hereto and made a part hereof.

2. The tax year in question is the year 1954, and the property covered thereby was listed as of January 1, 1954, except inventory, which was averaged on a twelve months basis for the calendar year 1953.

3. (Omitted).

[fol. 74] 4. There was included by Appellee, as taxable, for the year 1954 iron ores of a value of $1,393,232, which had been imported by Appellant from foreign countries, namely, Brazil, Cuba, Mexico, Liberia, and Canada. Exhibit D attached hereto and made a part hereof. Said imported ores were kept adjacent to Appellant's manufacturing facilities in a structure having two parallel walls, and on which there was located a movable ore bridge. (Exhibits A and B supra).

The Brazilian, Cuban, Mexican, and Liberian ores were purchased for ultimate use in Appellant's open hearth furnaces, and the Seine River ore was purchased for ultimate use in Appellant's blast furnaces. The Brazilian, Cuban, Mexican, and Liberian ores were transported by ocean vessels to the port of entry into this country, which was either Baltimore or Philadelphia. In the movement of these ores a steamship was chartered for each movement which involved only a single and particular grade of ore. The imported ore was loaded into the vessel at the foreign port and transported in bulk by such vessel to the port of entry. At the port of entry the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk by rail from the port of entry to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to the Appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage

pile in a separate area of the ore yard where it was held for ultimate use in the open hearth furnaces of Appellant. [fol. 75] The importation of the Seine River ore (a single and particular grade of ore) involved a lake vessel movement from a Canadian port to Cleveland, Ohio. The imported ore was transported by vessel in bulk to the port of entry (Cleveland, Ohio). At Cleveland, Ohio the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk from Cleveland by rail to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to Appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard, where it was held for ultimate use in the blast furnaces of Appellant.

A separate storage pile was maintained for each grade of imported ore, i.e. Brazilian, Cuban, Mexican, Liberian and Seine River, and such particular grade of imported ore was not commingled with other ore or property of the Appellant except that different vessel shipments of identical ore were piled one on top of the other as such additional shipments arrived (i.e. Brazilian on Brazilian, Cuban on Cuban, Mexican on Mexican, Liberian on Liberian, and Canadian on Canadian).

From time to time, as needed, a portion of the imported ore in each separate storage pile was removed from such pile and transported to the stock bins in the case of the blast furnaces and stock houses in the case of the open hearth furnaces for use in said blast furnaces and open hearth furnaces of the Appellant. Exhibits A and B supra.

Appellant maintained a supply of imported ores sufficient [fol. 76] to meet its estimated requirements for a period of at least three months.

5. (Omitted).

6. The assessments made by the Tax Commissioner by Preliminary Assessment Certificate, dated August 23, 1954, by Amended Preliminary Assessment Certificate, dated August 30, 1954, and as determined in the Journal Entry, dated March 2, 1954, were as set forth on the "Summary of

Valuations by Taxing District". Exhibit F attached hereto and made a part hereof.

7. As used herein, the words, "imported" or "importation", shall not be deemed to be dispositive of the question in issue as to whether the subject ores imported from Brazil, Cuba, Mexico, Liberia, or Canada retained their characteristics as imports immune from state taxation where said ores had been commingled in the ore yards of Appellant with ores of the same kind (i.e. Brazilian with Brazilian, Cuban with Cuban, Mexican with Mexican, Liberian with Liberian, and Canadian with Canadian) from other separate vessel shipments and where a portion of such commingled ores had been withdrawn for use in the blast or open hearth furnaces of Appellant.

8. All values, as set forth in Exhibits C to E, inclusive, are book values taken from Appellant's books.

/s/ C. William O'Neill, Attorney General, State of Ohio, /s/ Larry H. Snyder, Assistant Attorney missioner of Ohio.

/s/ Carlton S. Dargusch, Sr., Attorney for The Youngstown Sheet & Tube Company.

Note

p. 37 (Exhibit A) is outsized and is not reproducible

[fol. 77a] **Exhibit B**

Map showing general layout of buildings of Campbell and Struthers Works of Youngstown Sheet and Tube Company

(See Opposite) ☞

Note

p. 39 (Exhibit B) is not economically reproducible

[fol. 78]

Exhibit D

The Youngstown Sheet and Tube Company
1954 Ohio Personal Property Tax

Inventory of Iron Ore Imported from Foreign Countries

Summary by Taxing District

	Average Monthly Inventory Value
Trumbull County:	
City of Girard	$ 119,126
Mahoning County:	
City of Youngstown	37,666
City of Campbell	874,711
City of Struthers—Poland Township	361,729
Total Mahoning County	$1,274,106
Grand Total	$1,393,232

Detail

Location and Description of Ore	Ultimate Use of Ore	Average Monthly Inventory Value
Brier Hill Works:		
West Storage Yard—City of Girard:		
Brazilian Ore	Open Hearth Furnaces	$ 60,915
Cuban Ore	Open Hearth Furnaces	23,384
Mexican Ore	Open Hearth Furnaces	34,827
Total West Storage Yard		$ 119,126

Open Hearth Stock House—City of Youngstown		
Brazilian Ore	Open Hearth Furnaces	$ 26,008
Mexican Ore	Open Hearth Furnaces	9,549
Liberian Ore	Open Hearth Furnaces	2,109
Total Open Hearth Stock House		$ 37,666
Total Brier Hill Works		$ 156,792
CAMPBELL WORKS:		
Blast Furnace Ore Yard—City of Campbell:		
Seine River Ore	Blast Furnace	$ 791,787
Open Hearth Stock House—City of Campbell:		
Brazilian Ore	Open Hearth Furnaces	$ 62,458
Cuban Ore	Open Hearth Furnaces	3,238
Mexican Ore	Open Hearth Furnaces	13,969
Liberian Ore	Open Hearth Furnaces	3,259
Struthers Storage Yard—City of Struthers—Poland Township:		$ 82,924
Brazilian Ore	Open Hearth Furnaces	$ 353,780
Cuban Ore	Open Hearth Furnaces	7,949
Total Rod and Wire Storage Yard		$ 361,729
Total Campbell Works		$1,236,440
Grand Total		$1,393,232

[fol. 79]

Schedule 1

EXHIBIT F.

The Youngstown Sheet and Tube Company
1954 Ohio Personal Property Tax

Summary of Valuations by Taxing District
(Trumbull, Mahoning, Ashtabula and Cuyahoga Counties)

	True Value Based on Preliminary Certificate 8-23-54	True Value Based on Amended Preliminary Certificate 8-30-54		True Value Based on Journal Entry Dated March 2, 1955	
		Increase	Amended Value	Increase	Amended Value
Schedule 2—Machinery and Equipment:					
Trumbull County:					
Village of Hubbard	$ 411,724	—	411,724	—	411,724
Township of Hubbard	7,198	—	7,198	—	7,198
City of Girard	3,014,124	—	3,014,124	—	3,014,124
Mahoning County:					
City of Youngstown	9,872,384	—	9,872,384	947,065	10,819,449
City of Campbell	22,131,286	—	22,131,286	825,739	22,957,025
City of Struthers—Coitsville Township	1,246,796	—	1,246,796	3,085,077	4,331,873

[fol. 80]

City of Struthers—Poland Township	3,152,433	—	3,152,433	39,772	3,192,205
Total Schedule 2	$39,835,345	—	39,835,945	4,897,653	44,733,598
Schedule 3—Inventories (Manufacturing):					
Ashtabula County:					
City of Ashtabula	—	873,033	873,033	—	873,033
Cuyahoga County:					
Bedford Township	—	714,779	714,779	—	714,779
Trumbull County:					
Village of Hubbard	$ 539,715	—	539,715	—	539,715
City of Girard	600,373	677,637	1,278,010	119,126	1,397,136
Mahoning County:					
City of Youngstown	3,793,556	2,102,414	5,895,970	37,666	5,933,636
City of Campbell	7,831,775	5,053,590	12,885,365	874,711	13,760,076
City of Struthers—Coitsville Township	170,350	—	170,350	—	170,350
City of Struthers—Poland Township	2,429,021	2,620,682	5,049,703	361,729	5,411,432
Total Schedule 3	$15,364,790	12,042,135	27,406,925	1,393,232	28,800,157
Total Schedules 2 and 3	$55,200,735	12,042,135	67,242,870	6,290,885	73,533,755

[fol. 81]

	True Value Based on Preliminary Certificate 8-23-54	True Value Based on Amended Preliminary Certificate 8-30-54		True Value Based on Journal Entry Dated March 2, 1955	
		Increase	Amended Value	Increase	Amended Value
Assessed Value at 50%	$27,600,360	6,021,080	33,621,440		
Add:					
Assessed Values—Schedule 3-A:					
Mahoning County	4,940	—	4,940		
Cuyahoga County	1,190	—	1,190		
Assessed Values—Schedule 4:					
Trumbull County	700	—	700		
Mahoning County	148,990	—	148,990		
Total Assessed Value	$27,756,180	6,021,080	33,777,260		
Assessed Value Per Preliminary Assessment Certificates:					
Trumbull County	$ 2,287,270	338,820	2,626,090		
Mahoning County	25,467,720	4,888,350	30,356,070		
Ashtabula County	—	436,520	436,520		
Cuyahoga County	1,190	357,390	358,580		
Total Assessed Value, as above	$27,756,180	6,021,080	33,777,260		

[fol. 82] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 83]

IN THE SUPREME COURT OF THE STATE OF OHIO

JOURNAL ENTRIES

Tuesday, June 25, 1957. Journal No. 42, p. 353.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until August 3 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Monday, July 29, 1957. Journal No. 42, p. 368.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until September 30 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Tuesday, October 1, 1957. Journal No. 42, p. 393.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until October 31 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 3]

IN SUPREME COURT OF OHIO

No. 34868

THE YOUNGSTOWN SHEET & TUBE COMPANY, Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

Appeal from the Board of Tax Appeals

EXCERPTS FROM MEMORANDA OF PLEADINGS, ETC. FILED WRITS ISSUED, ETC., JUDGMENTS, ORDERS AND DECREES

Journal No. 42, page 242.

Appeal from the Board of Tax Appeals:

JOURNAL ENTRY OF JUDGMENT—January 30, 1957

This cause came on to be heard upon the transcript of the Record of the Board of Tax Appeals and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the decision of the said Board of Tax Appeals be and the same hereby is affirmed except to the extent that it relates to the claimed deduction from the tax base on account of "drawings", and the cause is remanded to the Board of Tax Appeals for further proceedings.

ORDERED, That a special mandate be sent to the Board of Tax Appeals, to carry this Judgment into Execution.

[fol. 4] Journal No. 42, page 259.

Rehearing Docket:

JOURNAL ENTRY OF ORDER DENYING REHEARING—February 20, 1957

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

[fol. 5] [File endorsement omitted]
[fol. 6]

IN THE SUPREME COURT OF OHIO

YOUNGSTOWN SHEET AND TUBE CO., Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

CERTIFICATE OF SUPREME COURT OF OHIO AS TO CONSTITUTIONAL QUESTION—Filed May 20, 1957

On motion of the appellant, Youngstown Sheet and Tube Co., it is ordered to be certified and made a part of the record of the proceeding and of the judgment of the Court in the cause that by its appeal from the Board of Tax Appeals, the appellant placed in issue the constitutionality of former Section 5701.08, Revised Code of Ohio, contending that the said Section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations and that the Court found, pursuant to appeal, briefs and oral argument of counsel, (and by its decision in Allied Stores of Ohio, Inc. v. Bowers, 166 OS 116) that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the [fol. 7] Section to include Appellant within the exception; that therefore the Section must stand; that so standing and so construed the Section was not repugnant to the United States Constitution or if repugnant, had nevertheless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the Court's decision.

Witness The Honorable Supreme Court of Ohio, this 20 day of May, 1957.

Supreme Court of Ohio

/s/ Hon. Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio.

[fol. 10]

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 34868

YOUNGSTOWN SHEET AND TUBE CO., Appellant,

v.

STANLEY J. BOWERS, Tax Commissioner of Ohio, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 30, 1957

I. Notice is herewith given that Youngstown Sheet and Tube Co., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio affirming the Board of Tax Appeals of Ohio, such final judgment having been entered on January 30, 1957, and from the final judgment of the said Supreme Court of Ohio denying the appellant's application for rehearing entered on February 20, 1957.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in the cause, for transmission to the clerk of the Supreme Court of the United States, and include in said transcript the following:

1) A copy of the final determination of the Tax Commissioner.

2) A copy of appellant's notice of appeal from the Tax Commissioner's final determination, as filed with the Board of Tax Appeals.

3) A copy of the opinion of the Board of Tax Appeals of Ohio in this case.

4) A copy of the opinion of the Board of Tax Appeals of Ohio in *Allied Stores of Ohio* v. *Bowers*.

5) A copy of the notice of appeal from the Board of Tax Appeals, as filed with this Court on behalf of the appellant.

6) A copy of the opinion of this Court in this case.

7) A copy of the opinion of this Court in *Allied Stores of Ohio* v. *Bowers* (No. 34926), 166 O.S. 116.

8) A copy of the application for rehearing, as filed with this Court on behalf of the appellant.

[fol. 11] 9) A transcript of docket and journal entries of this Court in this cause, on the merits and on application for rehearing.

10) A transcript of all transcripts and evidence certified by the Board of Tax Appeals to this Court.

III. The following questions are presented by this appeal:

1. Does former Section 5701.08, Revised Code, deny the appellant equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

2. Does a statute which excepts from property tax, merchandise belonging to nonresidents when held for storage only, but taxes such merchandise belonging to residents deny residents equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States?

/s/ Carlton S. Dargusch, Attorney for Youngstown Sheet and Tube Co., Appellant, 33 North High Street, Columbus 15, Ohio.

[fol. 12] PROOF OF SERVICE (omitted in printing).

[fol. 13] CERTIFICATE OF SERVICE (omitted in printing).

[fols. 15-18] Opinion and Order of Tax Commissioner appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 5.

[fols. 24-43] Opinion and Order of Board of Tax Appeals appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 8.

[fols. 66-75] Opinion in Nos. 34872 and 34868, Taft, J., appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 25.

[fols. 84-85] Application for Rehearing in Nos. 34872 and 34868 appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 32.

[fol. 86]

BEFORE THE BOARD OF TAX APPEALS
Department of Taxation
State of Ohio

Case No. 34868

STIPULATION OF FACTS—Filed August 18, 1955

It is stipulated and agreed by and between counsel for the respective parties hereto that the following stipulation may be considered as the facts for all purposes pertinent to the consideration and decision of the above case, subject, however, to the right of either party to offer additional evidence concerning engineering expenditures including the value of drawings, specifications and other detail incident thereto.

1. The Youngstown Sheet and Tube Company, Appellant herein, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, with its principal office located in the Stambaugh Building, Youngstown, Ohio, and with plants for the manufacture of iron and Steel (including products) in Mahoning and Trumbull Counties, Ohio. Exhibits A and B attached hereto and made a part hereof.

2. The tax year in question is the year 1954, and the property covered thereby was listed as of January 1, 1954, except inventory, which was averaged on a twelve months basis for the calendar year 1953.

3. (Omitted).

4. (Omitted).

[fol. 87] 5. There was included by Appellee, as taxable, for the year 1954 certain tangible personal property, consisting of raw materials and finished seamless pipe (sic) as set forth in Exhibit E, attached hereto and made a part thereof.

Said tangible personal property consisted of:

(a) Iron ore, produced in the United States and stored (in a rectangular structure having four walls

and on two walls of which there was located a movable ore bridge) on Lake Erie public docks at Ashtabula, Ashtabula County, and Bedford, Cuyahoga County, and held for ultimate use in manufacturing. The Lake Erie public docks at Bedford (Cuyahoga County) were owned, controlled and operated by the Erie Dock Company, and the Lake Erie public docks at Ashtabula (Ashtabula County) were owned, controlled and operated by the Ashtabula and Buffalo Dock Co.

(b) Raw materials consisting of iron ore, coal, scrap, limestone, fluor spar, ferros and additions stored adjacent to Appellant's manufacturing facilities in Trumbull and Mahoning Counties and held for ultimate use in manufacturing by Appellant. The domestic iron ore at Appellant's manufacturing facilities was stored in the same manner and in the same type of structure as the imported ore. The Appellant's properties in Trumbull and Mahoning Counties were enclosed by wire fences and other enclosures.

[fol. 88] (c) Finished seamless pipe manufactured in Ohio and stored in the pipe storage yard adjacent to Appellant's manufacturing facilities in Mahoning County and held for ultimate sale by Appellant.

With the exception of the iron ore stored on Lake Erie public docks, all inventories were located on properties of Appellant and were under its control at all times. Exhibits A and B supra.

The raw materials, consisting of domestic and imported iron ore, coal, scrap, limestone, fluor spar, ferros and additions, were in saleable form, as was the finished seamless pipe. Said raw materials were not held by Appellant for resale but were held by the Appellant for use in manufacturing. The finished seamless pipe was held for ultimate sale by Appellant.

6. The assessments made by the Tax Commissioner by Preliminary Assessment Certificate, dated August 23, 1954, by Amended Preliminary Assessment Certificate, dated August 30, 1954, and as determined in the Journal Entry, dated March 2, 1954, were as set forth on the "Summary of

Valuations by Taxing District." Exhibit F attached hereto and made a part hereof.

7. (Omitted).

8. All values, as set forth in Exhibits C to E, inclusive, are book values taken from Appellant's books.

/s/ C. William O'Neill, Attorney General, State of Ohio, /s/ Larry H. Snyder, Assistant Attorney General, State of Ohio, Attorneys for Tax Commissioner of Ohio.

/s/ Carlton S. Dargusch, Sr., Attorney for the Youngstown Sheet & Tube Company.

[fols. 89-90] EXHIBITS A and B appearing in certified transcript at this point are omitted since they are printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 37.

[fol. 89A]

EXHIBIT E.

Schedule 4

The Youngstown Sheet and Tube Company
1954 Ohio Personal Property Tax
Inventory of Merchandise Kept Within Ohio

	Average Monthly Inventory Value
Summary by Taxing District	
Ashtabula County:	
City of Ashtabula:	
Iron Ore	$ 873,033
Cuyahoga County:	
Township of Bedford:	
Iron Ore	$ 714,779
Trumbull County:	
City of Girard:	
Iron Ore	$ 7,721
Coal	153,939
Scrap	296,870
Limestone	14,718
Fluor Spar	22,090
Ferros and Additions	182,299
Total Trumbull County—City of Girard	$ 677,637

[fol. 90A]

Mahoning County:	
City of Youngstown:	
Iron Ore	$ 1,729,068
Coal	357,961
Limestone	11,044
Ferros and Additions	4,341
Total City of Youngstown	$ 2,102,414
City of Campbell:	
Iron Ore	$ 5,053,590
City of Struthers, Poland Township:	
Iron Ore	$ 27,186
Coal	1,701,741
Scrap	119,968
Limestone	26,383
Ferros and Additions	234,042
Finished Seamless Pipe	511,363
Total City of Struthers—Poland Township	$ 2,620,682
Total Mahoning County	$ 9,776,686
Grand Total—Material held for Storage Only	$12,042,135

[fol. 91]

Schedule 4-A
Sheet 1

Description and Location of Merchandise	Ultimate Use of Merchandise	Average Monthly Inventory Value
Iron Ore at Lake Erie Docks		
Iron Ore:		
Ashtabula Dock of The Ashtabula and Buffalo Dock Company—City of Ashtabula:		
Various Grades of Blast Furnace Ore	Blast Furnaces	$ 873,033
Randall Dock of the Erie Dock Company—Township of Bedford:		
Various Grades of Blast Furnace Ore	Blast Furnaces	714,779
Total Iron Ore at Lake Erie Docks		$ 1,587,812
Brier Hill Works		
Iron Ore:		
Blast Furnace Ore Yard—City of Youngstown:		
Various Grades of Blast Furnace Ore	Blast Furnaces	$ 1,729,068
West Storage Yard—City of Girard:		
Zenith Lump Open Hearth Ore	Open Hearth Furnaces	7,721
Total Iron Ore		$ 1,736,789

[fol. 92]

Coal:			
West Storage Yard—City of Girard:			
Steam Coal	Steam Boilers	$	35,069
High Volatile Coal	Coke Ovens		76,760
Low Volatile Coal	Coke Ovens		42,110
Total West Storage Yard			153,939
Storage Yard at Old Benzol Plant—City of Youngstown:			
High Volatile Coal	Coke Ovens		256,348
Low Volatile Coal	Coke Ovens		101,613
Total Storage Yard at Old Benzol Plant			357,961
Total Coal			511,900
Scrap:			
West Storage Yard—City of Girard:			
Various Grades of Blast Furnace Scrap	Blast Furnaces	$	1,427
Various Grades of Open Hearth Scrap	Open Hearth Furnaces		295,443
Total Scrap		$	296,870
Limestone:			
West Storage Yard—City of Girard:			
Blast Furnace Limestone	Blast Furnaces	$	10,139

[fol. 93]

Description and Location of Merchandise	Ultimate Use of Merchandise	Average Monthly Inventory Value
Open Hearth Limestone	Open Hearth Furnaces	4,579
Total West Storage Yard		14,718
At East End of Blast Furnace Ore Yard—City of Youngstown:		
Blast Furnace Limestone	Blast Furnaces	370
Open Hearth Limestone	Open Hearth Furnaces	6,475
Total East End of Blast Furnace Ore Yard		6,845
At West End of Blast Furnace Ore Yard—City of Youngstown:		
Blast Furnace Limestone	Blast Furnaces	4,199
Total Limestone		$ 25,762
Fluor Spar:		
West Storage Yard—City of Girard	Open Hearth Furnaces	$ 22,090

[fol. 94]

Schedule 4-A
Sheet 2

Description and Location of Merchandise	Ultimate Use of Merchandise	Average Monthly Inventory Value
Brier Hill Works—Continued		
Ferros and Additions:		
West Storage Yard—City of Girard:		
Ferros and Additions	Open Hearth Furnaces	$ 182,299
At East End of Blast Furnace Ore Yard—City of Youngstown:		
Dolomite	Blast Furnaces	2,378
At West End of Blast Furnace Ore Yard—City of Youngstown:		
Dolomite	Blast Furnaces	1,963
Total Ferros and Additions		$ 186,640
Total Brier Hill Works		$ 2,780,051

[fol. 95]

Description and Location of Merchandise	Ultimate Use of Merchandise	Average Monthly Inventory Value
Campbell Works		
Iron Ore:		
Blast Furnace Ore Yard—City of Campbell:		
Various Grades of Blast Furnace Ore	Blast Furnaces	$ 5,053,590
Struthers Storage Yard—City of Struthers—Poland Township:		
Zenith Lump Open Hearth Ore	Open Hearth Furnaces	27,186
Total Iron Ore		$ 5,080,776
Coal:		
Struthers Storage Yard—City of Struthers—Poland Towship:		
Steam Coal	Steam Boilers	$ 87,110
Gas Coal	Gas Producers (Seamless)	46,006
High Volatile Coal	Coke Ovens	896,032
Low Volatile Coal	Coke Ovens	672,593
Total Coal		$ 1,701,741
Scrap:		
Struthers Storage Yard—City of Struthers—Poland Towship:		
Various Grades of Open Hearth Scrap	Open Hearth Furnaces	$ 119,968

[fol. 96]

Limestone:		
Struthers Storage Yard—City of Struthers—Poland Township:		
Blast Furnace Limestone	Blast Furnaces	$ 18,142
Open Hearth Limestone	Open Hearth Furnaces	8,241
Total Limestone		$ 26,383
Ferros and Additions:		
Struthers Storage Yard—City of Struthers—Poland Township:		
Ferros and Additions	Blast Furnaces	$ 23,197
Ferros and Additions	Open Hearth Furnaces	210,845
Total Ferros and Additions		$ 234,042
Finished Seamless Pipe:		
Struthers Storage Yard—City of Struthers—Poland Township	For Shipment	$ 511,362
Total Campbell Works		$ 7,674,272
Grand Total—Material Held for Storage Only		$12,042,135

[fols. 97-99] EXHIBIT F appearing in certified transcript at this point is omitted since it is printed in the record in companion case of Youngstown Sheet and Tube Company v. Stanley J. Bowers, Tax Commissioner of Ohio, Case No. 34872, see page 42.

[fol. 100] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 101]

IN THE SUPREME COURT OF THE STATE OF OHIO

JOURNAL ENTRIES

Tuesday, June 25, 1957 Journal No. 42, p. 352.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until August 3 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Monday, July 29, 1957. Journal No. 42, p. 368.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until September 30 for the docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Tuesday, October 1, 1957. Journal No. 42, p. 393.

The appellant, Youngstown Sheet and Tube Company, is herewith for good cause shown, granted an extension of time until October 31 for docketing of this case and the filing of the record and jurisdictional statement. Carl V. Weygandt, Chief Justice.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 102]

SUPREME COURT OF THE UNITED STATES

Nos. 588 and 589, October Term, 1957

[Title omitted]

Appeals from the Supreme Court of the State of Ohio.

ORDER NOTING PROBABLE JURISDICTION—January 6, 1958

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours allowed for oral argument.

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 44

UNITED STATES PLYWOOD CORPORATION,
PETITIONER,

vs.

CITY OF ALGOMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED APRIL 1, 1958
CERTIORARI GRANTED MAY 19, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 44

UNITED STATES PLYWOOD CORPORATION,
PETITIONER,

vs.

CITY OF ALGOMA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF WISCONSIN

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[fol. 3]

IN THE CIRCUIT COURT OF KEWAUNEE COUNTY STATE OF WISCONSIN

Case No. 4390

UNITED STATES PLYWOOD CORPORATION, a foreign corporation, Plaintiff,

v.

CITY OF ALGOMA, a Wisconsin municipal corporation, Defendant.

COMPLAINT—Filed April 5, 1956

The Plaintiff by Whyte, Hirschboeck & Minahan, its attorneys complains against the defendant as follows:

1. At all times hereinafter mentioned the plaintiff was and now is a corporation duly organized and existing under the laws of the State of New York and is licensed to do business in the State of Wisconsin. Plaintiff conducts its business in the State of Wisconsin, under the name of Algoma Plywood and Veneer Company, a division, whose principal office and place of business is the City of Algoma, Wisconsin.

2. At all times hereinafter mentioned the defendant, City of Algoma, was and now is a municipal corporation existing pursuant to Chapter 62 of the Statutes of Wisconsin and is situated in the County of Kewaunee, State of Wisconsin.

3. On or about May 1, 1955 Plaintiff owned certain real estate and improvements situated in the City of Algoma, Wisconsin which were assessed to plaintiff by defendant under the General Property Tax and placed on the assessment roll and billed to plaintiff in the amounts shown below:

Tax Bill No.	Tax Roll Page	Assessed Valuation	General Property Tax
72	132	$ 333,660.00	$ 6,191.16
73	129	36,120.00	670.22
74	132	29,890.00	554.62
75	80	10,130.00	187.97
76	50	7,320.00	135.82
77	47	1,080.00	20.04
78	49	2,348,090.00	43,569.51
79	29	2,820.00	52.33
80	9 L60	13,750.00	255.14
81	52	2,850.00	52.88
82	129	14,880.00	276.10
83	153	9,080.00	168.48
		$2,809,670.00	$52,134.27

[fol. 4] The aforesaid assessment was segregated as follows:

Land, manufacturing	$ 101,840.00	
Improvements	2,660,800.00	
	$2,762,640.00	
Unimproved lots	6,750.00	
Residential lots and improvements	40,280.00	
	$2,809,670.00	

The foregoing assessment is grossly in excess of the full value which could ordinarily be obtained for such real estate and improvements, and any part thereof, at a private sale and, without limiting the generality of the foregoing, said manufacturing land valuation computation plaintiff is informed and believes was based on a price of approximately $5,000 per acre which bears no relation to a private sale price and does not consider the characteristics of the soil, its location, and its adaptability or its cost, selling prices of similar properties, or other relevant considerations; the assessments of manufacturing improvements, residential lots and improvements are grossly in excess of any price obtainable at a private sale or any reconstructed private sale prices which could be arrived at by a combination of

cost less depreciation, replacement cost, sales of similar property, or other relevant valuation criteria.

4. On or about May 1, 1955, plaintiff owned certain personal property situated in the City of Algoma which was assessed by defendant to plaintiff under the General Property Tax and placed on the assessment roll and billed to plaintiff in the following amounts:

Bill No. 12—Page 2, Line 21

	Assessment	*Tax*
Manufacturers Stock (Contains $144,296.26 of imported veneers)	$1,936,805.00	
Logs, timber	71,925.00	
Machinery, tools, etc.	98,440.00	
Furniture and fixtures	25,050.00	
All other	71,360.00	
	$2,203,580.00	$40,888.12

The imported veneers included in Manufacturers Stock were shipped into this state from foreign countries and [fol. 5] were in storage on May 1, 1955 in their original package. Such veneers are exempt from state taxation under Article I, Section 10, Clause 2 of the United States Constitution which prohibits the states from levying duties on imports. The assessment on personal property does not reflect the true cash value of the items assessed and, without limiting the generality of the foregoing, the assessment on logs and timber is not the true cash value and is excessive in that it erroneously includes certain freight charges and over-values the timber stock; and the assessment made on machinery, tools, etc. is grossly in excess of their true cash value.

5. For the reasons above stated, on or about August 24, 1955 Plaintiff duly and timely presented written objections to the aforesaid assessments to the Board of Review of the City of Algoma conformably with Wis. Stats. Sec. 70.47.

6. On or about September 19, 1955 Plaintiff duly appeared before the Board of Review of the City of Algoma

in support of its objections and its authorized representatives in good faith presented evidence to such Board in support of its objections and made full disclosure under oath before said Board of Review of all of its property liable to assessment and the value thereof.

7. Thereafter the Board of Review of the defendant City, by order dated September 29, 1955 affirmed all of the assessments made by the City Assessor, without change.

8. On the 4th day of January, 1956, plaintiff paid to the City Treasurer of Algoma, Wisconsin, Under Protest, the General Property Taxes assessed and levied against it for 1955 of $93,022.39, claiming that said taxes were excessive and illegally assessed and levied.

9. On or about the 6th day of January, 1956, plaintiff duly and timely filed with the City Clerk and the Common Council of the City of Algoma its claim for refund of taxes in the amount of $93,022.39 conformably with Wisconsin [fol. 6] Statutes Sec. 74.73(4) as repealed and recreated by Chapter 440, Laws of 1955. A copy of said refund claim is attached hereto and made a part hereof as though set forth at length.

10. Plaintiff has not been informed of any action taken by Defendant on its claim and more than sixty (60) days have elapsed since it was filed. Accordingly, plaintiff brings the action within ninety (90) days after the claim was filed.

11. Plaintiff has duly complied with all conditions prescribed by law for the recovery of the said excessive and illegal property taxes and the interest thereon.

Wherefore, Plaintiff demands judgment against the defendant in the amount of ninety three thousand twenty two dollars and thirty nine cents ($93,022.39) with interest thereon from January 4, 1956 together with the costs and disbursements of this action.

/s/ Whyte, Hirschboeck & Minahan, Attorneys for Plaintiff.

P. O. Address: Suite 604, 735 North Water Street, Milwaukee 2, Wisconsin.

[File endorsement omitted]

[fol. 7] *Duly sworn to by Martin R. Browning, jurat omitted in printing.*

[fol. 8] ATTACHMENT TO COMPLAINT

ALGOMA PLYWOOD & VENEER COMPANY

Algoma, Wisconsin

A DIVISION OF

UNITED STATES PLYWOOD CORPORATION

(Emblem)

CLAIM FOR TAX REFUND

January 6, 1956

To: City Clerk,
City of Algoma
City Hall
Algoma, Wisconsin

The Common Council
City of Algoma
City Hall
Algoma, Wisconsin

Please Take Notice, that Algoma Plywood and Veneer Company, a Division of United States Plywood Corporation (hereinafter called "Claimant"), of Algoma, Wisconsin, hereby claims against the City of Algoma under the provisions of Wisconsin Statutes Sec. 74.73(4) as repealed and recreated by Chapter 440, Laws of 1955, refund of the sum of $93,022.39, said sum being the taxes paid under Protest by the Claimant on January 4, 1956, on property situated in the City of Algoma, Wisconsin, which taxes were excessive and illegally assessed and levied as hereinafter stated, by said City of Algoma for the year 1955.

The 1955 property tax paid by Claimant of $93,022.39 was levied upon an assessed valuation of $5,013,250.00 which [fol. 9] was made up of the following items:

Real Property		
Land, Manufacturing	$ 101,840.00	
Improvements	2,660,800.00	
	2,762,640.00	
Unimproved Lots	6,750.00	
Residential Lots and Improvements	40,280.00	
Total		$2,809,670.00
Personal Property		
Manufacturers Stock	$1,936,805.00*	
Logs, Timber, etc.	71,925.00	
Machinery, Tools, etc.	98,440.00	
Furniture & Fixtures	25,050.00	
All Others	71,360.00	
Total		$2,203,580.00
		$5,013,250.00

*Includes $144,296.26 of imported veneers.

This claim for refund is based upon the fact that the entire assessment was illegal and excessive and more specifically without limiting the generality of the foregoing, the real property assessment on land and improvements was grossly in excess of that value obtainable at a private sale, the criteria required by Wis. Stats. Sec. 70.32; the assessment on imported veneers is unconstitutional in violation of Article I, Sec. 10, Clause 2 of the United States Constitution which prohibits the state from laying duties on imports; the assessment of logs and timber was excessive, and the assessment of repair and maintenance parts was excessive.

[fol. 10]

Dated this 6th day of January, 1956.

ALGOMA PLYWOOD AND VENEER COMPANY
(A Division of United States
Plywood Corporation)

By /s/ F. D. KAMBACH
F. D. Kambach, Treasurer

By /s/ JOHN P. SCHLICK
John P. Schlick, Treasurer for
United States Plywood Corporation

[fol. 12] [File endorsement omitted]

IN CIRCUIT COURT OF KEWAUNEE COUNTY,
STATE OF WISCONSIN

[Title omitted]

ANSWER—Filed May 1, 1956

The above named defendant by S. Knudson and by Larkin and Blum, its attorneys, answers plaintiff's complaint as follows:

1. That defendant denies that the assessment of real estate and improvements, referred to in paragraph number 3 of plaintiff's complaint, on or about May 1, 1955, was in excess of the full value which could ordinarily be obtained for such real estate and improvements at a private sale; that defendant denies that such assessment and the valuation of said real estate and improvements bears no relation to a private sale price or does not consider the characteristics of the soil, its location, and its adaptability, or the selling prices of similar properties, and other relevant considerations; that defendant denies that such assessment and the valuation of said real estate and improvements are in excess of any price obtainable at a private sale or any reconstructed private sale prices which could be ar- [fol. 13] rived at by a combination of cost less depreciation, replacement cost, sales of similar properties and other relevant valuation criteria;

2. That defendant has not knowledge or information sufficient to form a belief that the imported veneers mentioned in paragraph number 4 of plaintiff's complaint were shipped into this state from foreign countries or were in storage on May 1, 1955, in their original package and for such reason defendant denies the same; that defendant denies that the assessment on personal property mentioned in paragraph number 4 of plaintiff's complaint does not reflect the true cash value of the items assessed, and denies that such assessment on logs and timber as mentioned in said paragraph is not the true cash value, and denies that such assessment of said logs and timber er-

roneously includes freight charges, and denies that such assessment of said logs and timber over-values the timber stock and that the assessment of the machinery, tools, etc. mentioned in said paragraph number 4 is in excess of their true cash value;

3. That defendant has not knowledge or information sufficient to form a belief that plaintiff on or about September 19, 1955, before the Board of Review of the City of Algoma made full disclosure under oath of all of plaintiff's property liable to assessment and the value thereof;

[fol. 14] 4. That defendant has not knowledge or information sufficient to form a belief that plaintiff's claim for refund of taxes, referred to in paragraph number 9 of plaintiff's complaint, was filed conformably with Wisconsin Statutes Section 74.73(4) as repealed and recreated by Chapter 440, Laws of 1955;

5. That defendant has not knowledge or information sufficient to form a belief that plaintiff has complied with all conditions prescribed by law for the recovery of property taxes and interest thereon, as alleged in paragraph number 11 of plaintiff's complaint, and for such reason defendant denies the same;

Wherefore, Defendant demands judgment that plaintiff's complaint be dismissed and defendant recover its costs and disbursements herein.

S. Knudson, Post Office Address: City of Algoma, County of Kewaunee, State of Wisconsin and Larkin and Blum, Post Office Address: 303 South Barstow Street, City of Eau Claire, County of Eau Claire, State of Wisconsin, Attorneys for defendant.

[fol. 15] *Duly sworn to by Anna M. Birdsall, jurat omitted in printing.*

[fol. 17] Acknowledgment of service (omitted in printing.)

[fol. 18] [File endorsement omitted]

IN THE CIRCUIT COURT OF KEWAUNEE COUNTY,
STATE OF WISCONSIN

UNITED STATES PLYWOOD CORPORATION,
A Foreign Corporation, Plaintiff,

v.

CITY OF ALGOMA, A Wisconsin Municipal Corporation,
Defendant.

MEMORANDUM DECISION—October 24, 1956

Plaintiff owns and operates as one of its divisions a plywood and veneer plant in the city of Algoma. It paid its real and personal property taxes for the year 1955 under protest and brings this action against the city under sec. 74.73 to recover the portions of such taxes claimed to have been illegally exacted. The action involves questions of exemptions of imports and excessive valuations. There is also involved a question of duplication of taxes.

(a) Imported Veneers and Lumber

In the manufacture of its veneered products the plaintiff uses both domestic and foreign lumber and veneers. The latter is directly imported by plaintiff as importer from Canada, France and the Belgian Congo. From Canada comes birch veneer, from France, French oak veneer, and from Africa, species of veneer known as korina and fuma. The veneers, both foreign and domestic, are shipped to plaintiff in bundles or wooden crates,—mostly the former. The bundles are secured by metal straps, and they, like the crates, undoubtedly meet all the requirements of an "original package", as that term is used in the cases when [fol. 19] taxability of imports by a state depends upon whether the goods are in the original package in which they were imported. The foreign lumber is imported by plaintiff directly from Ontario, Canada. The species are

birch and cedar. The lumber is used as core material. When received, it is piled in plaintiff's yard. It is claimed that each individual piece of lumber in a pile constituted an original package. The foreign veneers are kept stored in a warehouse until needed in manufacture, and, when needed, the packages are broken, and the individual pieces then commence their journey through the plant to become part of a veneered product.

Plaintiff reported as personal property subject to the state's ad valorem personal property tax all foreign veneers that had been taken from original packages on May 1st, 1955, and all foreign lumber that had been taken from piles in the yard to be run through the plant, but claimed, and still claims, that all imported veneers in its warehouse that remained in unbroken original packages and all imported lumber that remained in piles in its yard were immune from taxation under clause 2 of sec. 10 of Art. I of the Federal Constitution, which, so far as here material provides:

> "No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws . . . "

The asserted immunity is based upon *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678, and *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 65 S. Ct. 870, 89 L. ed. 1252. In the last mentioned case (hereinafter referred to as the *Hooven* case) the taxpayer was a manufacturer of cordage and other similar products in which it used foreign hemp, which it imported in bales. The question before the court [fol. 20] was the taxability of the hemp while remaining in bales in the taxpayer's warehouse and awaiting use. Such hemp was regarded as being in original packages and non-taxable. The *Hooven* case would be dispositive, in plaintiff's favor, of the question of the taxability of any part of the foreign veneers remaining in the warehouse in their original packages (and likewise dispositive of taxability of lumber if it be assumed both that each individual piece of lumber constituted an original package and that the lumber did not enter the manufacturing process until

taken from piles and run through the plant) were it not for the following language of the court:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." (89 L. ed. 1264)

Acting, no doubt, under the authority of an opinion of the Attorney General rendered November 10th, 1949 (38 A. O. G. 563), which is to the effect that the *Hooven* case did not close the door to taxation of that part of a manufacturer's stock of imported raw materials essential to current manufacturing operations notwithstanding that such materials on hand May 1st remained in their original packages, the assessor taxed against the petitioner the value of one-half of the imported veneers then in the [fol. 21] taxpayer's warehouse in original packages and imported lumber in piles, being of the opinion that one-half of such stock on hand was needed to meet current operational requirements.

As I understand one of the arguments of the taxpayer, it is to the effect that other portions of the majority opinion in the *Hooven* case, by necessary implication, dispel the notion that the supreme court intended to leave open the question of whether raw materials on hand in

original packages but needed by a manufacturer-taxpayer to meet his current manufacturing requirements is subject to an ad valorem personal property tax notwithstanding that the manufacturer is the importer. I consider, however, that the express reservation of the question contained in the language above quoted outweighs any implications to the contrary and requires the conclusion that the question with which we are now concerned remains open. I do not find in *Gardner-Richardson* v. *Evatt* (1946), 145 O. 363, 61 N. E. 2d 704, any consideration of the question whether such portion of a manufacturer's raw materials as was needed for current operational requirements was subject to tax nor any holding that such portion was not taxable. That point does not appear to have been considered.

In the *Hooven* case the court, before reserving the question above indicated, in part said:

> "It is evident, too, that if the tax immunity of imports, commanded by the Constitution, is to be reconciled with the right of the states to tax goods after their importation has become complete and they have become a part of the common mass of property within a state, 'there must be a point of time when the prohibition ceases, and the power of the state to tax commences.' Brown v. Maryland, supra (12 Wheat. (US) 441, 6 L. ed. 686)." (89 L. ed. 1259)
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> • • • • • • • •
>
> [fol. 22] "The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination, when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases." (89 L. ed. 1264)

There is nothing sacrosanct in the original package rule. Goods which come into this country on purchase by one engaged in the importing business and which are in turn sold in their original packages to a domestic manufacturer-user lose their constitutional immunity from state taxation

as imports the moment the sale is made by the importer to the manufacturer. They then become taxable to the manufacturer as in the case of other property. *Waring* v. *Mobile*, 8 Wall. (US) 110, 19 L. ed. 342.

The taxpayer sees in any departure from the original package rule,—that is to say, the rule that the immunity of contents of an original package from state taxation continues until the package is broken,—in the instant situation future problems involving tests which will be much more difficult of application than the original package test and which, it is claimed, will result in such lack of uniformity and confusion as to require adherence to a rule that all imports in original packages continue to enjoy immunity until the package is broken. I do not consider that any such difficulties provide sound and sufficient reasons for exempting a manufacturer from the state's personal property tax on that portion of his imported raw materials which he has himself imported and which remain in their original packages to the extent that such goods are needed to meet current operational needs. Lack of an infallibly accurate test does not argue against a power to tax. In this connection the dissenting opinion of Justice Black in the *Hooven* case should be considered.

[fol. 23] If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's ad valorem personal property tax.

By what criterion should a manufacturer's current or immediate need of a certain raw material be determined? In this connection the characteristics of Wisconsin's ad

valorem personal property tax require further consideration. It is, first of all, a tax that is not a levy in lien form against property but a tax assessed against the owner of the property. It is assessed as of May 1st. The taxpayer is not liable for tax on property that he may own the day before May 1st but does not own on the latter date; nor may he avoid the tax on property which he owns on May 1st but disposes of on May 2nd. The May 1st circumstances are those that control.

I think that an importer-user of foreign raw materials may be subjected to the Wisconsin personal property tax on such part of such materials remaining in original packages as he has on hand May 1st and which he will be required to have on hand in the immediate future to meet his [fol. 24] manufacturing needs for the period that would normally be required for him to secure additions to the inventory if he placed his order on May 1st, assuming the conduct of his business in the usual and normal manner. To illustrate: Assume a Wisconsin daily newspaper company that buys its newsprint from Canada. Its presses use 5 jumbo rolls of newsprint per day, each roll constituting an original package. Assume also that an order for newsprint requires 20 days for delivery. Assume further that the company customarily keeps on hand about 300 jumbo rolls and that it has on hand May 1st exactly 300 rolls. It would thus appear that the presence of at least 100 rolls in the warehouse was indispensable to continuous publication of the newspaper unless purchases were made from a nearby domestic owner, in which case the newsprint so purchased would not enjoy the immunity, because of the doctrine that a sale by a domestic importer puts an end to the immunity as an import. *Waring* v. *Mobile, supra.* I do not believe that the intent of the *Brown* and *Hooven* cases would prevent Wisconsin from assessing its personal property tax against 100 rolls of newsprint on hand May 1st. The situation as it existed on that day was that the company could not, short of 20 days, import additional newsprint, and unless it had a 20-day supply on hand there could be no continuous publication of the newspaper with newsprint imported by the newspaper company from Canada. While of the 300 rolls

on hand 200 could be regarded as surplus stock, certainly 100 rolls constituted the minimum requirement of current needs and should be regarded as being so irrevocably appropriated to use by the newspaper company as to have entered the process of publishing a local newspaper. I do not consider that the fact that orders placed before May 1st [fol. 25] may have assured delivery of further newsprint before May 20th argues against the validity of the suggested criterion in the application of Wisconsin's *May 1st* personal property tax.

There are, of course, other criteria that may reasonably be used to determine in a practical manner what raw materials a manufacturer must have on hand to assure continuous operations. Counsel for the city has in this case suggested a "manufacturing cycle" test, and it may be that that test is better than the one indicated above. The "manufacturing cycle" test amply supports the conclusion of the assessor that one-half of the foreign imports on hand May 1st were required to be on hand to meet plaintiff's immediate needs.

In its report of taxable personal property, submitted by the taxpayer pursuant to sec. 70.35 (1) on June 7th, 1955, the following statement appears (Exhibit 8, page 4):

"Non-assessable Raw Materials (Note A) $288,593."

* * * * * * * *

"(Note A) Non-assessable Raw Materials consist of veneers and lumber, which are imported into the United States from Africa, Canada, and France upon which import duties have been paid to the Customs Department of the United States Treasury. These raw materials are stored in our raw material storage depot on May 1, 1955, in their original crates, cartons, bindings, etc., as such were received from Foreign countries at Ports of Entry."

Without attempting to draw any fine distinction between the lumber and veneers, the assessor determined that one-half the total, or $144,296.26, was taxable because needed to meet current operational requirements. The assessor reached his conclusion after study, inspection and observation of plaintiff's business and methods. Analysis of

Exhibit 36, which shows how long the foreign veneers and lumber would have lasted had such raw materials on [fol. 26] hand May 1st been used to fill orders rather than any subsequently received materials, sufficiently proves that the taxpayer had on hand not less than $144,296.26 in value of foreign veneers and lumber which were required to be on hand to meet current operational requirements. I do not think that the Federal Constitution requires that the assessor make separate determinations as to each separate class or specie of imports so long as the overall result remains within the value of total imports that have lost their character as such for purposes of an ad valorem state tax assessed against the owner. If the criterion suggested by the Court is a proper one, it may be claimed that the evidence lacks proof as to how long it would take to obtain a shipment of some of the imports. The burden of proof in this respect becomes important, but even though it rested with the city, Mr. Kambach's testimony as to the time it takes to obtain a shipment of French or African veneer, together with reasonable probabilities as to the time it takes to secure shipments of other imports, leaves the assessor's determination that imports to the value of $144,296.26 as being assessable against plaintiff fair and reasonable to the company.

What has been said assumes the taxability of lumber to be limited to operational needs as in the case of veneers. That was the assessor's view. But I think in such respect he was in error in not regarding a larger portion than one-half of the foreign lumber as being taxable. The taxpayer did not set aside any particular part of its lumber storage yard or veneer warehouse for the storage of foreign materials. Veneers were piled separately according to specie, without regard to whether the adjacent pile was of foreign or domestic origin and without regard to the time of receipt. A portion of a new shipment of fuma veneer, [fol. 27] for instance, would be placed on a partially depleted pile of that veneer and could be the first next taken for use. It is not considered, however, that there was such commingling of foreign and domestic veneers or foreign and domestic lumber as to cause a loss of identity.

Most of the foreign lumber when received was "green". Apparently most of the domestic lumber was purchased green also. All lumber when received was piled in a manner to facilitate air drying. While the method of piling adopted was intended also to prevent decay, it cannot be said that this was the dominant purpose. It appears that air drying never sufficiently removes the moisture content of lumber to permit its use by plaintiff without running the lumber through the dry kilns. It also appears that green lumber is not generally run through the dry kilns without a period of air drying and that it is not "good business practice" so to do. It is the normal procedure or practice that should and does control, and I think, at least as to the lumber received green—which accounts for most of the Canadian lumber—that when it was received and piled, the dominant purpose was to prepare it for use by air drying, thus by a slower but more economical process accomplishing in part what kiln drying would accomplish.

There is no evidence as to the proportion of Canadian lumber that was on hand that was received green except that most of it was. If it be claimed that lumber already partially air dried but sufficiently dry to be run through the dry kilns as a matter of good business practice was not subjected on piling to the processes of manufacture, I think that, conceding the validity of such claim, it, nevertheless, becomes clear that green lumber on receipt and piling entered the "process of manufacture" and lost im-[fol. 28] munity as an import. In the *Hooven* case the court said:

> "This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported." (89 L. ed. 1264)

The assessor would have been warranted in taxing all of the green Canadian lumber. When received by the taxpayer it was not ready for use if good business practices were followed by the taxpayer. When the company received the lumber it immediately proceeded to make it

ready for use by subjecting it to the air drying. Such air drying was part of its manufacturing practices.

A further question has been raised in connection with imports, and that is whether each individual piece of lumber constituted an original package. This lumber comes in rough form, that is, unplaned. It is 2 inches thick, of standard lengths and of standard widths, such as 4 inches or 6 inches. Counsel for the taxpayer cites the case of *Dant & Russell, Inc.* v. *Board of Supervisors of Los Angeles County* (Cal. App. 1942), 128 P. 2d 389, as authoritatively deciding that each individual piece of lumber in a shipment received by the taxpayer from Canada was an original package. Language in the opinion in that case is to such effect. The supreme court of California, however, reversed the decision (133 P. 2d 817 (1943)). While the reversal was on other grounds, the same appellate court that rendered the decision, later declared that the effect of the supreme court's decision was to "black out" and leave without any "authoritative value or standing" the determination that each piece of lumber was an original package and came to the opposite conclusion. *E. J. Stanton & Sons* v. *Los Angeles County* (1947), 78 Cal. App. 2d 181, 177 P. 2d 804. In the last mentioned case it appears that [fol. 29] Stanton was engaged in the wholesale and retail lumber business. He imported lumber which, as in the instant case, was shipped loose,—that is, not bundled or fastened together in any other way. He was taxed on the portion of the shipment that remained after sales had been made from such shipment. The tax was upheld. The supreme court of California refused a hearing, and the United States supreme court denied certiorari. 332 U. S. 766, 68 S. Ct. 75, 92 L. ed. 352. See *Simon* v. *City of Los Angeles* (Cal. App., April 24th, 1956), 296 P. 2d 381, where the court gives effect to the decision in the *Stanton* case as follows:

> "The power of the county to tax was thus upheld upon the theory that the 'aggregation of articles imported' constituted in legal concept an original package which was broken when some of the parts of the 'aggregation' were sold locally. The case undoubtedly represents the law applicable to a situation where packaging is in-

herently impossible or impracticable. Our Supreme Court refused a hearing and the United States Supreme Court denied certiorari. 332 U. S. 766, 68 S. Ct. 75, 92 L. ed. 352. But the Stanton case does not control imports which actually are in packages. In such instances the question is what is the original form or package."

The evidence here was not directed to the ascertainment of whether the foreign lumber on hand May 1st consisted of broken or unbroken shipments. Such determination is unimportant to the sustainability of the assessment upon the grounds assigned by the assessor.

[fol. 30] *(b) Excessive Valuation Of Real And Personal Property*

Plaintiff operates a large industrial plant in a small city. Its real estate consists of two plants, known as the Perry Street Plant and the Navarino Street Plant. In addition to the lands which are used industrially plaintiff owns three residences and three vacant residence lots. The latter six parcels of real estate were separately assessed in the manner usual in such cases (Exhibits 13 to 18). No complaint is made of these assessments. The complaint goes to the valuation of the industrial lands and buildings and certain items of personal property.

Plaintiff's right to question the taxation of imports does not necessarily rest on sec. 74.73, but its right to a refund based upon "allegedly excessive assessments", whether of real or personal property, does. Counsel for the city calls attention to sec. 74.73-(2), which in part provides that

"No claim shall be allowed and no action shall be maintained under the provisions of this section unless it shall appear that the plaintiff has paid more than his equitable share of such taxes."

and to *Krom* v. *Antigo*, 220 Wis. 542, *Highlander* v. *Dodgeville*, 249 Wis. 502, and *Yawkey-Bissel Corp.* v. *Langlade*, 261 Wis. 524, which deal with plaintiff's burden in establishing that he "has paid more than his equitable share of such

taxes", and urges the Court to dispose of the claims of excessive assessments for reasons set forth in his brief as follows:

"It is defendant's position that *Highlander* v. *Dodgeville, supra,* rules the case at bar and that plaintiff has not offered evidence sufficient to cause the Court to act in weighing the evidence. Even if the assessment had been in an amount three times the fair market value of plaintiff's property, plaintiff could not have recovered unless it proved that the rest, or a substantial part of the rest, of the property in Algoma had been assessed on a different basis, such as only twice its fair market value. The burden of proof is on the plaintiff, and the presumption exists in favor of the correctness of the assessment. Under the *Krom* and *Highlander* cases, *supra,* plaintiff has offered insufficient evidence, and there is nothing to be considered by the court except the constitutional question.

[fol. 31] "In *Yawkey-Bissell Corp.* v. *Langlade,* 261 Wis. 524, 53 N.W. 2d 174 (1952) the taxpayer recovered for the reason that since 'the cutover lands in question were illegally assessed in 1948 at more than their full value, and no other property in the township was assessed at more than one-half of such value, such assessment of such lands was clearly illegal.' (page 527) This holding is a confirmation of the rule in *Highlander* v. *Dodgeville, supra,* and a practical application of that rule in setting up the requirements which a taxpayer must fulfill in order to recover. Plaintiff in the case at bar has not met those requirements.

"Assuming, as claimed by plaintiff, that the lands, the buildings, the logs and the repairs and maintenance parts of plaintiff were overassessed, and that there was a duplication of assessment in respect to machinery and furniture and fixtures, plaintiff has nevertheless, made insufficient showing to entitle it to recover. Since plaintiff failed to offer any testimony as to the value of the other real estate owned by it in Algoma and described in plaintiff's exhibits 13, 14, 15,

16, 17 and 18, plaintiff has failed to show that its property, taken as a whole, was assessed at more than its full market value, and that its property, taken as a whole, was assessed on a disproportionately higher basis than the rest of the taxable property in Algoma. The burden of proof is on the plaintiff, and plaintiff did not even offer evidence to prove that its property, taken as a whole, was assessed on a disproportionately higher basis than the rest of the taxable property."

The city's position is that by simply proving an assessment for more than market value a taxpayer does not make out a case for a refund. Plaintiff must go further, it is argued, and establish by evidence other than the testimony of the assessor that at least a substantial portion of other property in the taxing district is not assessed for more than market value. Merit in the argument is to be found in the probability that there has not yet been born an assessor who would admit on the witness stand that his purpose was to assess all property at 100% or 60% of true market value, as the case may be, but as to plaintiff he assessed at a higher percentage. Hence, a rule that would permit a taxpayer to recover a refund based upon an excess over a percentage assessment, which the assessor will always claim he applied to all similar property, upon mere proof that in plaintiff's case the assessor did not follow his rule, would, as a practical matter, permit plaintiff to make out a case under the statute without proving that the same injustice or error which infects his assessment does not also infect the assessment of at least a substantial portion of the taxpayers in his district.

[fol. 32] The city's contention that the plaintiff failed to prove that its residence lots and property were not assessed at less than full market value requires dismissal of the plaintiff's claims to an over-assessment of other of its property involves a question which would deserve serious consideration in the case of a taxpayer who owns two pieces of property—say, a merchant who owns a downtown store and also his residence—and in protesting the assessment of the store proves only its over-valuation without at the same time proving that there has been no under-

valuation of his home or the stock of merchandise in his store, on the theory that he stands before the court asking an equitable accounting of his taxes due his city and that he should not be permitted to recover any amount unless his aggregate tax bill is too high. While the equitable considerations in such a situation are apparent, they need receive no more attention here, because it is obvious that no conceivably reasonable claim of undervaluation of plaintiff's residence property could offset an over-valuation of plaintiff's industrial property by an amount that would leave a net over-assessment so small, under plaintiff's theory of values, as not to deserve consideration under the rule of the *Krom* and *Highlander* cases.

Acts passed by the 1953 and 1955 legislatures here require consideration. The 1953 legislature added subsec. (4) to sec. 74.73, thereby denying to a taxpayer the right to maintain a plenary action, such as the instant one, to recover as a refund the portion of his taxes which he established constituted an unjust share under the decisions of our supreme court and thus relegated him to certiorari proceedings under sec. 70.47 (9) (a) or to invoking the remedy before the department of taxation provided for by sec. 70.85.

The legislature, by Chapter 111 of the Laws of 1955, which became effective May 11th, 1955, changed sec. 70.49 (2) to read as follows:

> [fol. 33] "The value of all real and personal property entered into the assessment roll to which such affidavit is attached by the assessor shall, in all actions and proceedings involving such values, *be presumptive evidence that all such properties have been justly and equitably assessed in proper relationship to each other.*

Previously the statute made the values appearing on the roll *"presumptive evidence of the full market value"* of the property only.

The same legislature, by Chapter 440 of the Laws of 1955, effective July 26th, 1955, repealed and recreated subsec. (4) of sec. 74.73 so as to again permit suit to be brought to obtain a refund of taxes on account of an excessive assess-

ment. It is clear that the act which restored the cause of action did not dispense with or change any of the requisites of a cause of action under the statute, as established by prior decisions, and is, therefore, not here important.

Counsel for plaintiff does not contend that the change in sec. 70.49 (2) does not broaden and give more scope to the presumption accorded an assessment but does contend that it is inapplicable here because the new statute was not passed until May 11th, 1955. With this contention I disagree. The amendment merely changed a rule of evidence and did not affect any vested right. The change in the rule *did not operate to* give to an assessment a conclusive effect as distinguished from a presumptive effect. The present statute has application to this action, which was commenced long after the statute took effect. *Estate of Sletto,* 224 Wis. 178, 181; *Will of McNaughton,* 138 Wis. 179, 189; *Flanders v. Town of Merrimack,* 48 Wis. 567, 570. The assessment in the instant case actually was made after May 11th, 1955. While under sec. 70.10 assessments are required to be made as of the close of May 1st, they need not be completed before the first Monday in July. Taxpayer's personal property statement (Exhibit 8), filed in accordance with sec. 70.35, was not required to be filed before May 25th and was not filed until long after May 11th. *Northern Supply Co.* v. *City of Milwaukee,* 255 Wis. 509, is, clearly, not controlling.

[fol. 34] *Freight On Logs.* Complaint is made because the assessor, in arriving at the true cash value of certain logs on hand as part of the company's raw materials, took the figure at which the cost of the logs appeared on the company's books, which was $71,925. This cost, naturally, included the freight paid by the company. It appears that these logs are usually bought from places in northern Wisconsin and Minnesota, and that the logs were purchased F. O. B. the landing point or point of origin. Based upon testimony of Mr. Kambach that on a single occasion, and for reasons that do not appear, some logs were sold to a veneer plant in Menasha, the company assuming the freight, it is claimed that if plaintiff should not use its logs but should sell them instead, it would have to bear the freight, and, therefore, in computing the true cash value, freight which the plaintiff paid should be excluded. Naturally, if plaintiff

purchased logs from a certain point in northern Minnesota, paying the freight, and later sold some of such logs to a plant in Menasha, the Menasha buyer would not pay more than it would cost him to get the logs from northern Minnesota, and no doubt the freight to Menasha would not be more than to Algoma. This testimony falls far short of proving that the assessor erred in assessing the logs for $71,925, which was the cost of the logs to the company as shown on the company's books. I perceive no merit in plaintiff's contention. I think it can be safely said that, normally, any manufacturer deciding to sell off part of his raw materials rather than using them would have difficulty in realizing cost. As to other items of raw materials into which freight enters as a part of cost, no complaint is made that injustice is done by taking cost per the company's books as being the true cash value.

Repair And Maintenance Parts. The assessor added to plaintiff's personal property the company's repair and maintenance parts, which were carried on the books in the amount of $71,360 as prepaid expense, such figure representing cost, [fol. 35] but which had not been returned as assessable property. He valued this property at cost. While it is argued that this property should not be valued at cost, plaintiff offered no proof of value whatever, and there is nothing in the record in the way of proof that establishes that cost to plaintiff was not true cash value. Mere claim that an assessed value is too high falls far short of establishing a cause of action for a refund. See the *Krom* and *Highlander* cases, supra.

Industrial Lands And Buildings. Plaintiff claims that the assessed valuation of industrial buildings should be reduced from $1,297,066 to $586,000, under the proofs made, and the lands reduced from $101,840 to $16,485, and a refund of taxes ordered accordingly. The over-all assessment problem which plaintiff's properties create is self-evident. Plaintiff was dissatisfied with the 1954 assessment and filed a petition with the tax commission for a reassessment. Instead of ordering reassessment, the tax commission directed a supervised assessment to be made, pursuant to the statutes, in the year 1955, and to this method of procedure plaintiff did

not object. The commission appointed J. D. Semrad to supervise the assessment. Plaintiff protested its assessments before the board of review, and the board confirmed the assessments made.

At the trial plaintiff produced Kenneth Sarles as its chief expert witness. Richard Bourguignon, who assisted in preparing an appraisal, also testified in plaintiff's behalf as an expert. Both Mr. Semrad and Mr. Sarles qualified as experts, with an imposing experience background, and they differed radically as to the formula or method most reliable in determining market value of plaintiff's plant. Comparable sales as a criterion of value of the plant were non-existent. The market value of the plant—land, buildings and fixtures—lies in theory. Market value of the buildings and fixtures independently of the land also lies in [fol. 36] theory. The market value of bare industrial lands finds some test in the market value of neighboring lands. Conflict between these experts was to be expected. Mr. Semrad, however, does not stand before the Court as a paid expert employed by a private litigant. He was employed by the state tax commission to supervise a reassessment.

As to the value of the plants, including industrial lands, the testimony of Mr. Semrad sufficiently supports these values, and they must be sustained. *Wisconsin Malting Co.* v. *Manitowoc*, 225 Wis. 393. It should be noted that the basis upon which the plaintiff acquired these properties was not made to appear in evidence. Did it or did it not make its purchase on the basis of certain values being assigned to the tangible assets of the old company? While the plaintiff did not buy the assets of the old company but bought the outstanding capital stock instead, it seems reasonable to suppose that in the negotiations the market value of the physical plant received some consideration.

Duplication. The company reported (Exhibit 8) its machinery and tools constituting personal property at $98,445, and furniture, fixtures and equipment constituting personal property at $25,053. These were the depreciated values per the company's books. These values were accepted and reduced to round figures at $98,440 and $25,050, or a total of $123,490, and assessment was made accordingly. Mr. Semrad was not satisfied, however, to accept the depreciated

cost figures of machinery and equipment forming part of the real estate, which was all that the company had supplied him. He called for a statement of cost as to such items, and received Exhibit 10, which lists costs at $1,694,095.92, depreciation at $879,393, and net book value at $814,702.92. [fol. 37] Because of the great increase in costs in recent years Semrad added 15% to costs and then reduced that figure by 30% to arrive at present cash value. No complaint is now made as to such method of valuation, nor was any proof offered tending to show that the resulting figures were too high. It developed at the trial that in furnishing Exhibit 10 the company did not exclude machinery and equipment falling within the classification of personal property, and as a result Semrad was misled and inadvertently included in the assessment of $1,363,740 for fixed machinery and equipment in the Perry Street plant (Exhibit 20) and in the Navarino plant (Exhibit 19) the above mentioned personal property already assessed at the sum of $123,490.

I think that this showing calls for a holding that plaintiff is entitled to a refund in an amount it has satisfactorily proved its taxes were increased by the error. And I think, too, that no time should be spent on the proposition that had the error not been made, it may be questionable whether the total tax bill would have been less, because I believe that had the company listed in Exhibit 10 only its machinery and equipment constituting fixtures, Mr. Semrad would have employed the same percentages that he actually used in arriving at value. The duplication was the result of an inadvertent act. It was a mistake. And I think that it is such a mistake as, under the rationale of the decision in *State ex rel Pabst B. Co.* v. *Kotecki*, 163 Wis. 101, must be remedied, even though plaintiff did not produce proof of the value of the fixed machinery and equipment forming part of the real estate after excluding the duplicated items.

Counsel for plaintiff in his computations assumes that because the company reported the depreciated value May 1st, [fol. 38] 1955, of machinery and equipment constituting personal property as being a certain percentage of the May 1st, 1955, depreciated value of all machinery and equipment, whether personal property or forming part of the real estate (Exhibit 8), the same percentage must be used in re-

constructing the cost of machinery and equipment appearing on Exhibit 10 and which the assessor used as a starting point. That, of course, cannot be done because of the different rates of depreciation that were applied to different classes of machinery and equipment. I think that the refund should be based on what here appears as a certainty. Taken as personal property, the tax assessed amounted to $123,490 x .0185553, or $2,291.39. Taken as fixtures, the exact tax assessed is not determinable. If, as fixtures, the same property was taxed at a higher sum, plaintiff has not proved the amount. If taxed at a lesser sum, the city should not be heard to say that although it collected taxes on this property as real estate it should not refund the tax it has also collected on the property as personalty because there is a failure of definite proof as to the amount of taxes resulting from the assessment as real estate. The taxpayer is entitled to a refund in the amount of $2,291.39, with interest.

In General. Except as respects the constitutionality of the tax on imports and the unintended duplication of certain items of personal property, plaintiff's complaint in general simmers down to this: that the city of Algoma has assessed its real estate at values that exceed fair market value and certain of its personal property at values that exceed true cash value. It asks the Court to remedy such situation by adopting its own experts' ideas of value as to the lands and bare buildings. In fixing the true cash value [fol. 39] of logs it asks the Court to adopt a rule based upon an isolated experience that would appear to be contrary to common practice of manufacturers in valuing their raw material. As to repair and maintenance parts it produced no evidence of value but yet maintains that the Court should cut the assessor's figures one-half. I think it may be fairly said that what plaintiff in effect seeks to do is to make an assessor out of the Court. In *Buildings Development Co. v. Milwaukee*, 225 Wis. 357, 364, the court said:

> "But property owners must, in all but plain cases of breach of statutory duty, rely on just and fair treatment by assessing authorities, rather than the courts, for avoidance of intolerable assessments. We perceive nothing in the record before us to warrant the court in interfering with the instant assessments."

Plaintiff contends that the proof establishes a cause of action under sec. 74.73 justifying, if not requiring, reduction of building valuations from $1,297,066 to $586,000 and land values from $101,840 to $16,485. It is earnestly argued that reductions should be to the latter figures. Such a reduction would mean that the land assessment has been slightly more than six times market value and would convict Mr. Semrad of either an inexcusably neglectful performance of his duties or gross incompetency, although his history of employment by the tax commission to supervise assessments and the study made of values in this case and justification of values would indicate the exact contrary. Does the disparity between land value figures cast more doubt on the reliability of the testimony of plaintiff's experts than on Mr. Semrad? The presumption which the statute gives to the correctness of an assessor's figures would appear to be entitled to its strongest application when an assessment is supervised by an expert appointed by the tax commission.

We certainly do not here have such a case of injustice [fols. 40-41] as was established by the proofs of *Yawkey-Bissel Co.* v. *Antigo, supra.* Mr. Bosman's testimony, essentially hearsay in character, and the evidence as to the assessment of the Algoma Lumber Company lands, and the comparison made of their value to that of plaintiff's lands, fall far short of establishing a case for a refund within the rule of the *Highlander* case. The evidence does not warrant me in holding that the assessments are so substantially out of line with other assessments as to impose an inequitable tax burden. To grant a refund the case must be one in which the proofs warrant the court in holding, with a reasonable certainty of being right, that the taxpayer has paid a certain number of dollars too much in relation to other taxpayers. This is not such a case.

Plaintiff proposes a finding to the effect that Mr. Semrad as supervisor made the assessments without the concurrence of Mr. Graf, the city's assessor, and it is claimed that the assessment is illegal for that reason. The assessor and the supervisor acted together. Both signed the statutory affidavit attached to the assessment roll. Which of the two wrote the figures upon the assessment roll is not important.

Plaintiff is entitled to a refund on account of the duplication above dealt with, and that is all. As to costs, plaintiff

is entitled, I consider, to a $100 attorney fee and clerk's fees, and that other disbursements should be limited to two days attendance on the part of Mr. Kambach as a witness. I consider that only his testimony was essential to the proof of the duplication.

Dated this 24th day of October, 1956.

By the Court,

E. M. Duquaine, Circuit Judge.

[fol. 42]

IN THE CIRCUIT COURT OF KEWAUNEE COUNTY, STATE OF WISCONSIN.

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW— October 24, 1956

The issues joined in this action having come on for trial before the above named court and having been tried, the plaintiff appearing by Messrs. Whyte, Hirschboeck & Minahan, and defendant appearing by Messrs. Larkin & Blum and by S. Knudson, City Attorney, and after hearing the proofs of the parties and the arguments of counsel, and being advised in the premises,

Now, Therefore, I, The Hon. E. M. Duquaine, the judge before whom the same was tried, Do Decide And Find As

FINDINGS OF FACT

1. Plaintiff is a foreign corporation, licensed to do business in the State of Wisconsin, and was the owner of land, improvements and personal property within the City of Algoma, Kewaunee County, Wisconsin, on May 1st, 1955.

2. The City of Algoma comprises a taxing district within the State of Wisconsin for the assessment of property taxes upon land, improvements and personal property.

3. The City of Algoma assessed the real and personal property of plaintiff for taxation as of May 1st, 1955. Such

assessment was a supervised assessment under Wisconsin Statutes, the supervisor being Mr. J. D. Semrad. The city's assessor and said supervisor acted together in making the assessments, and both signed the statutory affidavit attached to the assessment roll. Plaintiff filed written objections to its assessments, and hearing on the same was held before the Board of Review of the City of Algoma. The Board of Review affirmed the assessments. Plaintiff paid [fol. 43] its real and personal property taxes for the year 1955, under protest, on January 4th, 1956. The city council took no action upon plaintiff's claim for refund, and plaintiff commenced this action on April 2nd, 1956.

4. In the manufacture of its products plaintiff uses both foreign and domestic wood veneers. Foreign veneers are directly imported by plaintiff as importer from Canada, France and the Belgian Congo. Such foreign veneers are received by plaintiff at its plant in Algoma in the original packages in which they are shipped. They are kept in such packages and stored in plaintiff's warehouse until used in the manufacture of a veneered product.

5. Plaintiff also uses both foreign and domestic lumber in its manufacturing operations. Foreign lumber is directly imported by plaintiff as importer from Ontario, Canada, the species being birch and cedar. The lumber is imported in rough form, that is, unplaned. It is 2 inches thick, of standard lengths and standard widths, such as 4 inches and 6 inches. It is shipped loose in railroad cars, the sticks or individual pieces of lumber not being bundled or fastened together in any other way. Most of the foreign lumber is purchased and received "green". The lumber when received is piled in plaintiff's storage yard in such manner as to facilitate air-drying and with the dominant purpose of subjecting the lumber to air-drying before converting it into a manufactured product. Air-drying does not sufficiently remove moisture from lumber to enable plaintiff to use it in its products. Some kiln-drying is necessary to bring the lumber to the degree of dryness requisite for use by plaintiff. While green lumber may be wholly kiln-dried, it is plaintiff's practice, and also good business practice, to subject green lumber to air-drying before running the lumber through the

dry kilns. That is more economical than wholly kiln-drying [fol. 44] green lumber. Most of the foreign lumber on hand in piles in the storage yard on May 1st, 1955, was lumber which had been received in green condition, and all such green lumber was then being subjected to the manufacture for which it was imported.

6. The foreign veneers on hand in warehouse in original packages and foreign lumber in piles in storage yard on hand May 1st, 1955, were of the value of $288,593. The assessor determined that one-half of the imported veneers and lumber were necessarily on hand to meet plaintiff's current operational needs as a manufacturer and assessed against plaintiff for personal property taxes the value of one-half of such foreign veneers and lumber, or $144,296.26. The assessor's determination was fair to the plaintiff, and it is the Court's finding that at least one-half of said foreign veneers and lumber and of the value of $144,296.26 were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer.

7. Veneer logs, which were assessed at a valuation of $75,925, were not assessed in excess of true cash value. Repair and maintenance parts, which were assessed at a valuation of $71,360, were not assessed in excess of true cash value.

8. Plaintiff's industrial real property was not assessed at more than full value which could ordinarily be obtained therefor at private sale.

9. In the valuation of $1,363,740 placed upon fixed machinery and equipment forming part of the industrial real estate there was inadvertently included by the assessor items of machinery, tools, furniture, fixtures and equipment constituting personal property separately assessed as personal property at a valuation of $123,490, and on account of which taxes in the amount of $2,291.39 were levied. No proof was adduced by plaintiff that fixed machinery and equipment, excluding the said items taxed as personalty, had a market value less than $1,363,749.

[fols. 45-46] Upon the foregoing Findings of Fact I make the following:

Conclusions of Law

1. The assessment of one-half the imported veneers and lumber on hand May 1st, 1955, at a valuation of $144,296.26 and the levy of a personal property tax thereon based on such valuation was not in violation of Article I, section 10, clause 2, of the United States Constitution.

2. Plaintiff has failed to establish a cause of action for a refund of taxes based upon real estate being assessed at more than full market value which could ordinarily be obtained therefor at private sale or personal property being assessed in excess of true cash value or based upon assessments made against plaintiff being so substantially out of line with other assessments as to impose an inequitable tax burden.

3. By reason of Finding of Fact No. 9, and notwithstanding Conclusion of Law No. 2, plaintiff is entitled to a refund of the personal property taxes in the amount of $2,291.39 assessed against the personal property of the valuation of $123,490 mentioned in Finding of Fact No. 9.

4. Plaintiff is entitled to Judgment against the defendant for the sum of $2,291.39, together with interest at 5% from January 4th, 1956, and together with costs in the amount of $100, plus clerk's fees, plus witness fees for two days attendance by Mr. Kambach.

Let Judgment be entered accordingly.

Dated this 24th day of October, 1956.

By the Court,

E. M. Duquaine, Circuit Judge.

[File endorsement omitted]

[fol. 50]

IN THE CIRCUIT COURT OF KEWAUNEE COUNTY,
STATE OF WISCONSIN

UNITED STATES PLYWOOD CORPORATION,
A Foreign Corporation, Plaintiff,

v.

CITY OF ALGOMA,
A Wisconsin Municipal Corporation, Defendant.

JUDGMENT—January 11, 1957

The Court having by order herein, dated January 10th, 1957, directed that Judgment be entered herein in favor of the plaintiff and against the defendant, which order is on file herein;

Now, Therefore, In Pursuance of such order and On Motion of Larkin & Blum and S. Knudson, attorneys for said defendant,

It Is Adjudged That the plaintiff have and recover of and from the defendant the sum of $2,536.00.

Dated this 11th day of January, 1957.

By the Court.

/s/ Orville J. Albrecht, Clerk.

[File endorsement omitted]

[fol. 65]

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

UNITED STATES PLYWOOD CORPORATION,
a foreign corporation, Appellant,

v.

CITY OF ALGOMA,
a Wisconsin municipal corporation, Respondent.

JUDGMENT—January 7, 1958

This cause came on to be heard on appeal from the judgment of the Circuit Court of Kewaunee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Kewaunee County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Ninety-nine Dollars and No Cents ($99.00).

Justices Brown, Currie and Steinle dissent.

[fol. 67]

IN THE SUPREME COURT OF THE STATE OF WISCONSIN

August Term 1957
No. 120

UNITED STATES PLYWOOD CORP.,
a foreign corporation, Appellant,

v.

CITY OF ALGOMA,
Wis. municipal corporation, Respondent.

Appeal from a judgment of the circuit court for Kewaunee County: E. M. Duquaine, Circuit Judge. *Affirmed.*

OPINION—Filed January 7, 1958

Action by a manufacturer against a city to recover taxes on personal property paid under protest. The property in controversy consisted in part of wood veneers and lumber

imported from outside the United States, and the validity of the tax on such veneers and lumber was challenged on the ground that it was an "impost or duty on imports" and therefore prohibited by Art. I, Sec. 10, Clause 2 of the Constitution of the United States. The trial court sustained the validity of the tax and denied recovery thereof. Plaintiff appeals.

The trial court made comprehensive findings of fact, the adequacy and correctness of which are not challenged. For present purposes, the facts may be summarized as follows: Plaintiff carries on a manufacturing business in the city of Algoma. In the manufacture of its products it uses both foreign and domestic wood veneers, and both foreign and domestic lumber. It imports the foreign veneers from vari- [fol. 68] ous nations, and they are received at its plant in Algoma in bundles secured by metal straps, or in wooden crates, such straps or crates being the original packages in which they are shipped. The veneers are kept in such packages and stored in plaintiff's warehouse until used in the manufacture of veneered products.

The foreign lumber is imported by plaintiff from Canada in rough unplaned form, in railroad cars, the individual pieces not being bundled or fastened together in any way. Most of this lumber is "green", and must be dried before being converted into manufactured products. When received it is piled in plaintiff's storage yard in such a manner as to facilitate air-drying, and for the dominant purpose of air-drying it. Air-drying does not remove enough of the moisture, and the lumber must also be kiln-dried. While the drying might be done entirely in the kiln, it is more economical, and is good business, to air-dry it before it is run through the kiln.

On the assessment date, May 1, 1955, foreign veneers and foreign lumber thus stored in plaintiff's warehouse and storage yard had a value of $288,593. The assessor determined, and the trial court found, that one-half of the imported veneers and lumber, of the value of $144,296 were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer. The court held, in an opinion carefully analyzing the authorities, that the constitutional provision invoked by the plaintiff

did not immunize the imported materials thus required for current operational needs, from the city's general property tax.

[fol. 69] Wingert, J. The question for decision is whether clause 2, of sec. 10 of Art. I of the Constitution of the United States prohibits the imposition of the city's general property tax on the veneer and lumber imported by the plaintiff from other nations, which are still in the original package or form in which imported, but which are held and needed for the manufacturer's current operational needs.

The constitutional provision is as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and controul of the Congress. * * * "

The purpose of the provision so far as it relates to imports appears to have been to prevent discrimination against imports by means of taxation, and to prevent the seaport states through whose harbors most imports then came, from taxing the imports of the other states, and thus burdening the commerce of the latter and continuing the commercial warfare between the states which it was one of the main objectives of the framers of the Constitution to suppress. See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.) 479; *Brown* v. *Maryland*, 12 Wheat. 419, 440.

1. *Established interpretations.* As an original proposition, it might well be doubted that a general property tax not discriminating against imported goods is "an impost or duty on imports". The Supreme Court of the United States has held that such a tax is within the purview of the constitutional provision, however, and of course we are bound thereby. *Low* v. *Austin*, 13 Wall. 29, 34.[1]

[1] A distinguished scholar in this field, the late Prof. Thomas Reed Powell, commenting on the opinions in *Hooven & Allison Co.*

[fol. 70] The leading case on the interpretation of the constitutional provision is *Brown* v. *Maryland,* 12 Wheat. 419, in which a state statute requiring importers of foreign goods by bale or package to take out a license and pay a fee of $50 before selling the goods, was held to impose an unconstitutional impost on imports. The extensive opinion by Chief Justice Marshall is one of that jurist's landmark opinions and characteristically went beyond the necessities of the particular case. While the Maryland statute was plainly discriminatory against imports and might have been disposed of on that ground, the Chief Justice went further and declared in substance that a tax on an imported article in the hands of the importer may be a duty or impost on the import. Referring to the above stated purpose of the constitutional provision, the Chief Justice said:

> " * * * it is plain, that the object would be as completely defeated by a power to tax the article in the hands of the importer *the instant it was landed,* as by a power to tax it while entering the port. * * * A duty on imports is a tax on the article which is paid by the consumer. The great importing States would thus levy a tax on the non-importing states * * * ". (p. 439-440)

Conceding that the immunity cannot follow the import indefinitely, and must end somewhere, the Chief Justice proceeded:

> "But, while we admit that sound principles of construction ought to restrain all Courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a po of time when the prohibition ceases, and the powe the State to tax commences; we cannot admit that this point of time is *the instant that the articles enter the country.* It is, we think, obvious, that this construction would defeat the prohibition." (p. 441)

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v. *Evatt,* 324 U.S. 652, says "We could welcome fresh consideration whether property taxes should be regarded as 'imposts' or 'duties' ". 58 Harvard Law Review 858, 874.

The Chief Justice recognized that it would be futile to try to stake out in advance the line where immunity ceases and the states' power to tax attaches.

> [fol. 71] "The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. * * * Yet the distinction exists, and *must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.*" (p. 441)

Nevertheless, and we must assume tentatively in view of the language just quoted,[2] he suggested the following principle:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (pp. 441-442)

Chief Justice Marshall said much more in the course of his lengthy opinion, by way of argument, illustration and dictum, and on another branch of the case held that the Maryland statute was also invalid under the commerce clause of the constitution (Art. I, sec. 8). It is no disparagement of the great Chief Justice to point out that some of his

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[2] "But he (Marshall) had too much of an instinct for the practical to attempt rigidities which could not possibly bind the future * * * and so his views were often tentative and suggestive; they conveyed cross-currents of doctrine and purposed ambiguity." Frankfurter, The Commerce Clause, 44-45.

dicta have not been followed by the court in later cases,[3] as for example, that to the effect that the principles laid down in *Brown* v. *Maryland, supra,* would apply equally to importations from a sister state. (12 Wheat. at 449) It has [fol. 72] later been held consistently that goods brought from another state are not imports within the meaning of Art. I, sec. 10 of the United States Constitution. *Woodruff* v. *Parham,* 8 Wall. 123, 136, *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 520. Likewise his original package doctrine has been repudiated as a criterion of immunity of interstate shipments under the commerce clause, from state taxation. *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506.

While *Brown* v. *Maryland* dealt with a statute prohibiting sale of imported goods by the importer without payment of a license fee, it has been accepted as authority for the broader proposition that the imported goods themselves cannot be taxed while held in the importer's warehouse in the original package, for resale. *Low* v. *Austin,* 13 Wall. 29, 34, *May* v. *New Orleans,* 178 U. S. 496, 507. Immunity does not depend upon a showing that the tax is in fact discriminatory against imports. *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 76. After the merchandise has once been sold by the importer, however, it is taxable as other property, even though remaining in the original package. *Waring* v. *Mayor,* 8 Wall. 110, 122.[4] If the goods are taken out of the original outer package, even before sale, their immunity as "imports" ceases though they are still in smaller original packages. *May* v. *New Orleans,* 178 U. S. 496, 508-509.

Brown v. *Maryland, supra,* and most of the earlier cases dealt with attempts to tax, directly or indirectly, goods held for resale. The leading case on state taxation of imports held by the importer for use in manufacture is *Hooven & Allison Co.* v. *Evatt,* 324 U.S. 652, 688.

[3] "• • • the rule announced in *Brown* v. *Maryland* has at times been severely criticized • • • and has in some cases been narrowly restricted in its application • • •." Black, J., dissenting in *Hooven & Allison Co.* v. *Evatt,* 324 U.S. 652, 688.

[4] A pledge of the goods by the importer has been held to terminate their immunity. *Southern Pac. Co.* v. *Calexico,* 288 Fed. 634, 641.

Allison Co. v. *Evatt*, 324 U. S. 652, decided in 1945. In that [fol. 73] case it was held that bales of hemp brought from the Phillipine (sic) Islands and stored in a manufacturer's warehouse in Ohio preliminary to use in the manufacture of cordage were imports in the hands of the importer within the meaning of Art. I, sec. 10, United States Constitution, and under *Brown* v. *Maryland, supra*, were immune from state ad valorem taxes. (pp. 664-668). Four justices dissented from that feature of the decision now pertinent, in an opinion by Mr. Justice Black, 324 U. S. at 686.

In *Hooven & Allison Co.* v. *Evatt, supra*, the court recognized that the constitutional immunity from state taxation is lost when imported goods are put to the use for which they were imported, or when the original packages in which they were imported are broken. (324 U. S. 652, at 665, 666). However, the majority was unwilling to terminate the constitutional immunity when the goods reached the factory warehouse in the original package.

> "But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation." (p. 666)

On the contrary, the majority affirmed the dictum of Chief Justice Taney in *License Cases*, 5 How. 504, 575.

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." (324 U. S. at 666).

Nevertheless the majority cautiously limited the decision to the case before it, holding that "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original package." (p. 667); and expressly saved the question which is before us today.

[fol. 74] "And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 667.

Even this carefully limited decision commanded the support of only five of the justices. The other four dissented in an opinion by Mr. Justice Black, who considered that every conceivable relationship the bales of hemp had once borne to the process of importation had ended, and that therefore they were no longer immune as imports; and also pointed out that to accord them constitutional immunity from property taxes would effect a discrimination in favor of foreign as against domestic products. 324 U. S. at 686-691.

To sum up the state of the law to date, it appears that imported goods are immune from even non-discriminatory taxes on general property until sold by the importer, or removed from the original packages in which imported, or put to the use for which acquired, as where placed in process of manufacture. The Supreme Court has held, by the narrowest of margins, that the mere warehousing of the goods preliminary to manufacture does not of itself terminate the immunity. The application of the tax to raw materials stored at the importer's factory, which, though still in the original package, are essential to current manufacturing requirements has been expressly left undecided.

2. *The imported lumber.* The lumber in issue was imported from Canada in carloads of individual pieces not bundled or fastened together, and was unloaded and piled [fol. 75] in plaintiff's storage yard to facilitate air-drying. We have little difficulty in holding that it had ceased to be immune from the city's general property tax on the assessment date.

The lumber is not protected from taxation by the original package doctrine, for it was unpackaged, unless the freight car be considered a package, in which case it was removed from the original package when unloaded. The individual sticks of lumber themselves are certainly not packaged or packages in any reasonable sense of the term. *E. J. Stanton & Sons* v. *County of Los Angeles,* 78 Cal. App., (2d) 181, 188, 177 P. (2d) 804, 808. Cert. den. 332 U. S. 766.

Moreover, these pieces of lumber had "entered the process of manufacture", and thus had been "put to the use for which they were imported" (*Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 657, 666) when they were stacked for air-drying, since the drying of the lumber was essential to manufacture, and therefore a first step in the manufacturing process. It was not necessary that the lumber be sawed up in order to place it in process of manufacture. The imported article consisted of a combination of wood and diffused water. Drying separates the wood from the water; sawing separates wood from wood. If the lumber had not been air-dried, it would have had to be kiln-dried for a longer time. Obviously it would be in process of manufacture when drying in an artificially-fired kiln. Removal of water is no less a manufacturing operation when performed out of doors by solar heat.

Insofar therefore as the judgment holds the lumber taxable, it must be affirmed.

[fol. 76] 3. *The imported veneers.* These present a much closer question. They were still in the original packages in which they were imported, consisting of metal straps around bundles of pieces in most cases, and of wooden crates in others. We assume for present purposes that straps holding bundles of pieces are a package. The veneers had not been subjected to any process to alter their form or chemical

composition, but had merely been stored in plaintiff's warehouse to await processing.

If no other facts appeared, and on the assumption that straps around a bundle make a package, we would be constrained to hold the veneers immune from the city's tax on the authority of *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, discussed above, notwithstanding the dissent of the maximum minority from that decision and our own philosophical doubts about its correctness. But there are other facts in the present case which in our opinion are sufficient to distinguish it from that one.

In the instant case it was found as a fact by the trial court, and the finding is not challenged by appellant, that the veneers which were actually taxed were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer. In making that finding, the trial court recognized the practical fact of industrial life, that if a manufacturer is to maintain the continuity of operation that is essential to efficiency and ability to meet competition and thus stay in business, he must at all times maintain on hand at his plant and ready for immediate use, a certain minimum stockpile of raw materials; and from that fact he stated the following conclusion:

> [fol. 77] "If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's ad valorem personal property tax."

The trial court's finding brings the present case squarely within the category which was expressly left undecided in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 667, quoted page 8 above, and which we may therefore decide on its merits.

We think the trial court was right in holding that the minimum stockpile of veneers which the manufacturer had to have on hand to meet current requirements was in substance being put to the use for which the raw materials were imported, even though not yet removed from their wrappings or subjected to any physical or chemical change. As to such goods, a rule which would make taxability depend upon the cutting of some metal bands or removal of a wrapping, would be too artificial and mechanical to commend itself. We think it would be equally mechanical, and disregardful of realities, to hold that the manufacturer must inaugurate some process of physical or chemical change before the goods can be considered as put to the use for which they were imported or can be regarded as a part of the mass of property which may be taxed for the support of state government. Foreign commerce, like commerce among the several states, "is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U. S. 375, [fol. 78] 398. As a practical matter, the minimum current operational requirements of materials which the manufacturer had assembled in his plant for purposes of immediate availability for change in form were in use in and devoted to the manufacturing enterprise, as much as if they were being dried, heated, reshaped, chemically treated, or otherwise changed in form or composition. The purpose for which the veneers were imported was to meet the requirements of a going manufacturing concern; and one of such requirements was the presence of a stockpile equal to minimum current manufacturing requirements. As a practical matter, a manufacturing enterprise cannot be carried on successfully without having current operational requirements of raw materials on hand, especially where it takes a considerable time to get more of the materials after ordering them, any more than it can be car-

ried on without changing their form or composition.[5] The decision under review merely recognizes and gives significance to that fact of industrial life.

We appreciate that there are expressions in the decisions of the U. S. Supreme Court which may be cited against the conclusion we have reached; but they must be read in connection with the facts of those cases. No case has been brought to our attention, nor have we found any, in which the facts on which the trial court based its decision in the present case were found to exist and were brought to the attention of the Supreme Court. In the one case where the argument was made, it was rejected and decision was specifically reserved on the point, because the record did not afford a basis for saying that any part of the imported material was required to meet immediate operational needs. *Hooven & YAllison* (sic) *Co.* v. *Evatt*, 324 U. S. 652, 664, 667.

[fol. 79] We think it accords with sound policy, and does no violence to either the purpose or the words of the constitutional provision, to hold that the city may tax the imported veneers in question. We are satisfied that the rule we are adopting preserves the immunity of imports long enough to serve all purposes for which the provision was adopted. The tax is not discriminatory, for it applies alike to all comparable property in the city, regardless of origin. The city has furnished a quid pro quo, by extending its police and fire protection to the veneers and lumber as to other property. The tax cannot prejudice foreign commerce, nor afford a means by which seaport or border states can burden the others or wage commercial warfare against them by taxing their imports, fear of which activity was the motive for adopting the constitutional provision.[6]

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[5] Respondent's brief puts the proposition picturesquely as follows: "If, when dawn broke over Algoma on the first day of May, 1955, appellant had everything on hand except the imported raw materials necessary to meet current manufacturing requirements, it is reasonable to assume that appellant would have been out of the manufacturing business, at least temporarily."

[6] After a penetrating commentary on the majority and minority opinions in *Hooven & Allison Co.* v. *Evatt*, *supra*, the late Prof.

On the other hand, to hold that the immunity of imported goods extends to the point claimed by appellant, would work an affirmative discrimination against domestic materials and against manufacturers using domestic materials, and would enable the importing manufacturers to obtain police, fire and other local protection and benefits without paying for them. While such discrimination also results from some applications of the constitutional provision in question by which we are bound, it is nevertheless proper to consider it as a relevant factor in determining whether the immunity should be extended beyond the absolute compulsion of the decisions of the court of last resort.

[fol. 80] It is argued that the original package rule is easy to administer, while it may be difficult to determine when imports have ceased to be imports as a result of becoming part of the stockpile required for current operational needs. We think, however, that the reasons both of constitutional law and policy against further extension of the immunity from state and local taxation outweigh mere problems of administration. Current operational requirements are a fact, not a fancy; and like value, they can be determined by the assessing authority, albeit sometimes with difficulty. The original package rule itself may present substantial administrative difficulties. See Mr. Justice Black's dissent in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 691; and *E. J. Stanton & Sons* v. *County of Los Angeles*, 78 Cal. App. 2d 181, 186, 177 P. 2d 804, 807. In taxation, absolute certainty cannot be had or expected, as the numerous cases on valuation pointedly illustrate.

By the Court.—Judgment affirmed.

[fol. 81] Brown, *J.* (Dissenting in part, concurring in part.) As an original construction of Art. I, Sec. 10, Cl. 2,

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Thomas Reed Powell said: "The immunity must survive to the extent that neither the goods nor dealings in them are, under any circumstances of time or place or condition, taxed or taxable because of their origin. To say that it must prevail against inclusion in general assessments after arrival or else be destroyed is to take an animistic view of the goods themselves as sacred objects and to forget the commercial aspects of foreign trade and domestic absorption." 58 Harvard Law Review, 858, 875.

U. S. Constitution, I would have little difficulty in agreeing with the dissenters in *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 688, 142 Ohio St. 235, that when imported goods or raw materials have reached the place where the importer intends to put them to the use for which they were imported and he stores them until he needs them, a non-discriminatory *ad valorem* tax upon them does not offend the Constitution even though the goods or materials in such storage remain in their original package. The difficulty would be even less in agreeing with the majority of this court that part of the goods are taxable.

But I must recognize that this is not an original proposition and the dissenters' view in *Hooven & Allison* v. *Evatt, supra,* is that of a minority. The majority in that case reiterated the law as it has been established by an un-[fol. 82] broken line of decisions beginning with *Brown* v. *Maryland* (1827), 12 Wheat. 419, that the constitution protects imported items against local taxation while they are in their original packages and have not been disposed of or used by the importer. For examples see *Low* v. *Austin* (1871), 80 U. S. 29; *Anglo-Chilean Corp.* v. *Alabama* (1933), 288 U. S. 218, 225 Ala. 141, as well as *Hooven & Allison Co.* v. *Evatt, supra.*

In the latter case, the majority said, p. 666:

> ". . . no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. . . ."

And, further, p. 667:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. . . ."

The law, as I read it, is well settled by the decisions of the supreme court of the United States that until put to use or sold or otherwise disposed of by the importer materials in their original packages are not subject to a state tax. The veneers now in question satisfy all these conditions

of immunity; and, like the fibers in *Hoover* (sic) *& Allison*, have not been subjected to manufacture. It is our proper province to apply that oft-stated law. It is not our province to modify it or to declare exceptions to it.

The argument, unsupported by the record, was made by the tax collector in *Hooven & Allison Co.* v. *Evatt, supra*, that some of the materials were so essential to current manufacturing requirements that they might be deemed to have entered the manufacturing process and so were taxable, as already put to use although still in their original packages. In reply to this the court said (p. 667) there was no necessity and no occasion to consider that question. I cannot agree with the majority of our court [fol. 83] that the form of the rejection of the argument changed the established law. The decision, in fact, *refused* to change it. Therefore I consider that this court is still bound to apply the law as it has been so often declared and as it remained when the court got through with *Hooven & Allison Co.* v. *Evatt, supra.* We, as a state court, have not been invited nor are we authorized to create an exception to the principle so often stated by the United States supreme court, that in the original package, unsold and unused imported materials are tax exempt. It is not for us to say that their immunity is lost when the day of use draws near. The United States supreme court was asked to make that change in the law. It would not. We should not.

Therefore, I think we must reverse, as to the veneers.

Respecting the lumber, the learned trial court found that the method of piling it had the dominant purpose of readying it for use. That finding makes it possible, I think, to agree that the manufacturing process had begun when the pile was constructed. Therefore I am able to concur in the decision that the lumber lost its status as an import and is taxable, though the ground that half of it is taxable because of current manufacturing needs is untenable.

I am authorized to say that Mr. Justice Currie and Mr. Justice Steinle concur in what is said here.

[fol. 84] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 85] SUPREME COURT OF THE UNITED STATES
No. 885—October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—May 19, 1958

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 588 and No. 589.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Appeal from the Supreme Court of Ohio.

THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Ohio, entered January 30, 1957, reversing in part and affirming in part the Board of Tax Appeals of Ohio. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

I

REFERENCE TO OPINIONS BELOW

The opinion of the Board of Tax Appeals of Ohio was entered April 30, 1956, being Case No. 28439 on the board's docket (unreported, see Appendix II).

The opinion of the Supreme Court of Ohio was entered January 30, 1957, *Youngstown Sheet and Tube Co. v. Bowers*, 166 Ohio St. 122, 140 N. E. 2d 313 (see Appendix III). Rehearing denied, February 20, 1957.

II

STATEMENT OF GROUNDS OF JURISDICTION

Proceedings leading to this appeal began when the Tax Commissioner of Ohio issued preliminary assessment certificates covering appellant Youngstown Sheet and Tube Company's storage merchandise and stocks of imported iron ores for tax year 1954. The commissioner affirmed the assessments on March 2, 1955. (See Appendix I.)

Appellant then appealed to the Board of Tax Appeals of Ohio, and on April 30, 1956, the board journalized its decision holding that Sections 5709.01, 5711.01, and 5711.03, Revised Code of Ohio, could not constitutionally tax appellant's imported iron ores, and further, that it had no jurisdiction to declare Section 5701.08, Revised Code of Ohio, unconstitutional as denying equal protection of the laws, thus affirming the tax against the storage merchandise. (Decision unreported, see Appendix II.)

Subsequently, within time, appellant appealed the equal protection side of the case, and the Tax Commissioner appealed the imports side, to the Supreme Court of Ohio.

The court reversed the board on the imports question and affirmed it on the equal protection question, which is to say, it held both the imports and storage merchandise subject to tax, *Youngstown Sheet and Tube Co. v. Bowers,* 166 Ohio St. 122, 140 N. E. 2d 313, decided January 30, 1957, and journalized by entry on the same date (see Appendix III). Application for rehearing was denied February 20, 1957, and the denial journalized by entry on the same date.

From the above judgment, notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio, on April 30, 1957.

III

STATUTES AND CASES

This is an appeal taken pursuant to 28 U.S.C.A., Section 1275 (2), and the cases believed to sustain the court's jurisdiction are *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, 66 L. Ed. 239, 42 S. Ct. 106; *Zucht v. King,* 260 U.S. 174, 67 L. Ed. 195, 43 S. Ct. 24; *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311, 47 L. Ed. 190, 23 S. Ct. 123; *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67, 73 L. Ed. 184, 49 S. Ct. 61; *Braniff Airways v. Nebraska,* 347 U.S. 590, 98 L. Ed. 967, 74 S. Ct. 757; *Charleston Federal Savings and Loan Association v. Alderson,* 324 U.S. 182, 185-6 n. 1, 89 L. Ed. 857, 65 S. Ct. 624; *Enterprise Irrigation District v. Farmers' Mutual Canal Co.,* 243 U.S. 157, 164, 61 L. Ed. 644, 37 S. Ct. 318; *Ward v. Board of County Commissioners,* 253 U.S. 17, 22, 64 L. Ed. 751, 40 S. Ct. 419; *West Chicago Street R. Co. v. Illinois,* 201 U.S. 506, 50 L. Ed. 845, 26 S. Ct. 518; *Steele v. Louisville & Nashville R. R. Co.,* 323 U.S. 192, 89 L. Ed. 173, 65 S. Ct. 226; *Postal Telegraph Cable Co. v. Newport,* 247 U.S. 464, 475-6, 62 L. Ed. 1215, 38 S. Ct. 566; *Lawrence*

v. State Tax Commissioner, 286 U.S. 276, 282, 76 L. Ed. 1102, 52 S. Ct. 556; *International Steel & Iron Co. v. National Surety Co.*, 297 U.S. 657, 662, 80 L. Ed. 961, 56 S. Ct. 619.

The principal statute pertaining to the imports issue is Section 5709.01, Revised Code of Ohio, (Title 57, *Page's Ohio Revised Code Annotated*, page 78; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 40), providing in material part:

> "All real property in this state is subject to taxation, except only such as is expressly exempt therefrom. *All personal property located and used in business in this state*, and all domestic animals kept in this state, whether or not used in business, *are subject to taxation*, regardless of the residence of the owners thereof." (Emphasis added)

Appendix IV sets forth verbatim the above section and Sections 5711.01 and 5711.03, Revised Code of Ohio.

The principal statute pertaining to the equal protection issue is Section 5701.08, Revised Code of Ohio, (Title 57, *Page's Ohio Revised Code Annotated*, page 13; Vol. 6, *Baldwin's Ohio Revised Code and Service*, Title 57, page 5,), which provides:

> "As used in Title 57 of the Revised Code:
>
> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation whether actually in operation or not, *or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only.* • • •
>
> "(B) 'Business' includes all enterprises conducted for gain, profit, or income and extends to personal service occupations." (Emphasis added)

For the above section verbatim see Appendix IV.

IV

QUESTIONS PRESENTED

This appeal presents the following questions:

First, may a state statute constitutionally impose a property tax upon bulk iron ores which have been imported from foreign countries and which are being stored in the same form as imported, not co-mingled with other property of the taxpayer and not yet used or about to be used by the taxpayer?

Second, does a statute deny residents of the state equal protection of laws under the Constitution of the United States by imposing a property tax upon the residents' storage merchandise held for storage only, while at the same time excepting the storage merchandise of nonresidents when held for storage only?

V

STATEMENT OF CASE

A. Material Facts

The facts have been stipulated (see Appendix V).

First the imports: During the year 1953 Youngstown Sheet and Tube imported iron ores in bulk from various foreign countries, Brazil, Cuba, Mexico, Liberia and Canada. The ores were kept in storage in the company's storage yards at a considerable distance from its factory.

Each shipment of Brazilian, Cuban, Mexican and Liberian ore was transported by ocean vessel to Baltimore or Philadelphia, the ports of entry; and there loaded into railroad cars and immediately shipped on to Youngstown, Ohio. Upon arrival at Youngstown the ores were unloaded at the

storage yards and placed in a separate storage pile in a separate area apart from any other property.

Each shipment of the Canadian (Seine River) ore was transported by lake vessel to Cleveland, Ohio, the port of entry, and there was loaded into railroad cars and immediately shipped on to Youngstown, where the cars were unloaded at appellant's storage yards, and the ore placed in a separate storage pile in a separate area of the yards, apart from any other property.

There was no co-mingling of the ores, excepting limited facilities required shipments of identical ore be put on top of each other (i.e. Brazilian on Brazilian, Cuban on Cuban, Mexican on Mexican, Liberian on Liberian and Canadian on Canadian). All ores were stored in the same form as imported.

Passing now to appellant's storage merchandise which it claims was unequally taxed, this consisted of domestic iron ore stored in concrete ore bins on the Lake Erie public docks at Ashtabula, Ohio and Bedford, Ohio, raw materials stored in Trumbull and Mahoning counties, and finished seamless pipe stored in pipe storage yard in Mahoning county.

The stipulation of facts is set forth in Appendix V.

B. Stage at Which the Federal Questions Was Raised

Appellant first raised its constitutional objections at the Tax Commissioner's hearing. (See the Tax Commissioner's entry, Appendix I.)

In its notice of appeal to the Ohio Board of Tax Appeals, appellant once more interposed its constitutional objections by assignment of errors:

> "2. Appellee erred in including, as taxable, iron ores imported by appellant from foreign countries,

which ores are immune from state taxation under the provisions of Article I, Clause 10, of the Constitution of the United States.

"3. Appellee erred in including as taxable, merchandise belonging to appellant and held for storage only in this state for the reason that like property belonging to a nonresident is excepted from taxation by Section 5701.08 of the Revised Code, and same section (and related sections), purporting to levy a tax on merchandise belonging to residents of this state and held for storage only, is, therefore, unconstitutional and void in that it denies appellant the equal protection of the law to which appellant is entitled under the Constitution of the State of Ohio and the Constitution of the United States."

The constitutionality of Section 5701.08, Revised Code of Ohio, was thereby challenged, and the board expressly recognized Sections 5709.01, 5711.01 and 5711.03, Revised Code of Ohio, as the sections taxing the imports. We quote from its opinion:

"These Code provisions appear to be the only sections thereof that could possibly be in conflict with the federal constitutional provision."

Under Ohio law, neither the Tax Commissioner nor the Board of Tax Appeals has jurisdiction over constitutional questions (See the commissioner's and board's opinions, Appendix I and Appendix II), although either may construe a statute so as to avoid unconstitutionality. This the board did on the imports by holding that the relevant sections could not tax them.

Thus, the taxpayer's first effective opportunity was before the Ohio Supreme Court, *Yakus v. United States* 321 U.S. 414, 444, 88 L. Ed. 834, 64 S. Ct. 660.

Inasmuch as it prevailed before the board on the imports question, its appeal to the court could only be of the

equal protection side. This was done explicitly by the first assignment of error in its notice of appeal:

> "1. Section 5701.08, Revised Code, under which inventories held by Appellant for storage only were assessed by the Tax Commissioner, denies Appellant equal protection of the laws is therefore unconstitutional."

Similar error was assigned in *Allied Stores of Ohio, Inc., v. Bowers*, 166 Ohio St. 116, 140 N. E. 2d 411, companion to the present case, and the court having decided *Allied Stores* first, simply applied its holding to this case and sustained the constitutionality of the statute.

Motion was duly filed with the Ohio Supreme Court to certify its holding, and make such certification a part of its judgment. We quote from the journalized statement:

> "On motion of the appellant, Youngstown Sheet and Tube Co., it is ordered to be certified and made a part of the record of the proceeding and of the judgment of the Court in the cause that by its appeal from the Board of Tax Appeals, the appellant placed in issue the constitutionality of former Section 5701.08, Revised Code of Ohio, contending that the said Section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations while excepting the same property of non-resident corporations, and that the Court found, pursuant to appeal, briefs and oral argument of counsel, (and by its decision in Allied Stores of Ohio, Inc., v. Bowers, 166 OS 116) that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the Section to include Appellant within the exception; that therefore the Section must stand; that so standing and so construed the Section was not repugnant to the United States Constitution or if repugnant, had never-

theless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the Court's decision."

The imports question was appealed by the Tax Commissioner who assigned the following errors:

"1. The Board of Tax Appeals erred in finding that imported ores included within the average monthly inventory base as a basis for an assessed tangible personal property assessment order entered by the Tax Commissioner for the year 1954, should not have been included therein.

"2. The decision of the Board of Tax Appeals is unreasonable and unlawful as to the reversal of the order of the Tax Commissioner with respect to the inclusion of certain imported ores within the average monthly inventory for the purpose of the assessment of tangible personal property tax for the year 1954."

The board's decision in turn was based on Article I, Section 10, Clause 2 of the Constitution and Sections 5709.01, 5711.01, and 5711.03, Ohio Revised Code, that those sections could not constitutionally tax appellant's iron ores because they were imports. Consequently, the issue before the Ohio Supreme Court had to be whether Sections 5709.01, 5711.01 and 5711.03, Revised Code of Ohio, were in conflict with Article I of the Constitution. The Supreme Court held that they were not and were constitutional.

Again the Ohio Supreme Court was requested to certify and make a part of its judgment the grounds of its holding, and we quote from the journal:

"* * * The Tax Commissioner, by his appeal to this court from the Board of Tax Appeals of Ohio, placed in issue the constitutionality of Section 5711.03, 5701.08, 5709.01 and 5711.01 of the Ohio Revised Code, as to whether appellant's iron ore imports were tax-

able under those Sections, or protected therefrom by Article I, Section 10, Clause 2 of the United States Constitution as imports; that this court, pursuant to appeal, and upon the record, briefs of counsel, and oral argument, reversed the Board of Tax Appeals of Ohio, which had held that appellant's iron ore imports were protected from the application of the above Sections, and in turn held that the Sections did tax appellant's iron ore imports; that upon consideration of the same, the court was of the opinion and accordingly decided, that the said Statutes were not invalid by reason of taxing appellant's iron ore imports and were not repugnant to the United States Constitution in so taxing; and that a determination of that question was appropriate and necessary to a decision in this case."

The certificates are attached under Appendix VI:

From the preceding discussion, appellant concludes that the constitutional questions involved in both phases of this case, imports and equal protection, were appropriately raised, and that the Ohio Supreme Court passed upon and upheld the constitutionality of the pertinent Ohio statutes.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. Imports

The questions presented by this appeal are both substantial and unique. So far as concerns the imports, counsel has found no United States Supreme Court decision holding directly on bulk imports, whether they have the same protection as packaged goods, or assuming they have, what test is to be applied.

Such decisions as are, however, lend support to the Ohio Board of Tax Appeals' analysis, rather than the Ohio Supreme Court's. The Board held bulk fungibles were non-taxable as much as were packaged imports, and the

test to be employed should be comparable in practice to the original package doctrine. Hence, concluded the board, while the iron ores were kept in storage in the same form as imported, they remained imports, but those amounts removed from storage and taken to stock bins and stock houses for day to day use were appropriated to the purpose for which they had been imported and ceased to be imports. The Ohio Supreme Court swept aside this analysis and ruled that each entire shipment of ore was a "package"; that the removal of any amount "broke the package"; and that not only was the ore in each shipment subject to tax, but also every new shipment placed on top of it. The court's syllabus holds:

> "1. If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, such protection cannot extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place and (2) after portions of such iron ore have been removed for use in manufacturing."

This holding is not consistent with decisions of this Court, or decisions of state courts treating the subject of fungible imports. The test set down by Chief Justice Marshall in *Brown, et al. v. The State of Maryland*, 12 Wheat. 419, 6 L. Ed. 678, was not restricted to packaged goods, as shown by his opinion on pages 441 and 442:

> "It is sufficient for the present to say, generally, that when the importer has *so acted* upon the thing imported hat it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the

state; but while remaining the property of the importer, in his warehouse, in the *original form* or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." (Emphasis added)

Chief Justice Taney iterated the rule in the *License Cases,* 5 How. 504, 12 L. Ed. 256 quoted with approval in *Low v. Austin,* 13 Wall. 29, 20 L. Ed. 517, on page 34.

"'Indeed, goods imported, while they remain in the hands of the importer, in the *form and shape* in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State Government.'" (Emphasis added)

A later case is *East Ohio Gas Co. v. Tax Commission of Ohio, et al.,* 283 U. S. 465, 75 L. Ed. 1171 51 S. Ct. 499. Reasoning from the analogy of an original package, the court held that natural gas in transportation pipes was in interstate commerce, albeit such quantities as were actually moved into distribution lines for day to day use, had been broken from the "original package" and thereupon ceased to be an object of commerce. This, of course, was the approach taken by The Ohio Board of Tax Appeals.

And see also *Sonneborn Brothers v. Keeling,* 262 U. S. 506, 67 L. Ed. 1095, 43 S. Ct. 643; *State Tax Commission of Mississippi v. Interstate Natural Gas Co., Inc.,* 284 U. S. 41, 76 L. Ed. 156, 52 S. Ct. 62; but compare *Gulf Fisheries v. MacInerney,* 276 U. S. 124, 72 L. Ed., 495, 48 S. Ct. 227.

A still more recent case is *The Hooven & Allison Co. v. Evatt,* 324 U. S. 652, 89 L. Ed. 1252, 65 S. Ct., 870, which also involved fungibles i.e. bales of hemp and rope fibre. The Court again held that they were imports until used for the purpose or subjected to the manufacture for which they had been imported.

Ohio taxpayers assumed that *Hooven & Allison* put to rest the taxability of imports, fungible as well as packaged, but apparently not. The Ohio Tax Commissioner and the Ohio Supreme Court have reverted to their position prior to *Hooven & Allison* that every imports shipment is taxable unless kept whole and completely intact. Aside from being at odds with this Court's decisions, such a demand is impractical. No importer can preserve entire shipments separately, if for no reason other than the limitations of storage space. Furthermore, importers of packaged goods are not required to keep each shipment unbroken and separate from other shipments, why then should importers of fungibles be judged by a different, more rigorous standard?

Identical to the present is a lower court case, *Mexican Petroleum Corp. v. Louisiana Tax Commission,* 173 La. 604, 138 So. 117, which held that various grades of crude oil imported in bulk and stored in separate tanks were not taxable, and that the storage of different shipments of the same grade of oil in the same tank did not constitute commingling.

To the same effect in *Re: Taxes Pacific Guano & Fertilizer Company,* 32 Hawaii 431, holding that imported phosphate ore was not taxable so long as it remained in bulk and separate from the general mass of property. See also *West Virginia & Maryland Gas Co. v. Towers,* 134 Md. 137, 106 A. 265.

Summarizing this part of its statement, appellant submits that the questions involved are substantial and unique; that the area of law on bulk imports should be clarified in order that taxpayers and tax administrators may know with reasonable certainty the proper rule applicable; and that the rule announced by the Ohio Supreme Court is

erroneous in view of this court's decisions, and discriminatory in view of the doctrine applicable to packaged goods.

B. Equal Protection

The limits of equal protection were set in *Ohio Oil Co. v. Conway,* 281 U.S. 146, 74 L. Ed. 775, 50 S. Ct. 310, at page 160:

> "* * * The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'."

Section 5709.01, Revised Code of Ohio, taxes personal property used in business in Ohio. In defining the phrase "used in business", Section 5701.08, Revised Code of Ohio, excluded "merchandise or agricultural products belonging to a nonresident of this state" when held for "storage only".

General Cigar Co., Inc., v. Peck, 159 Ohio St. 152, 111 N. E. (2d) 265, interpreted this exception:

> "1. The exception in the definition of 'used in business' contained in Section 5325-1, General Code, (present Section 5701.08, Revised Code) that 'merchandise of this state shall not be considered to be used in business in this state if held in a storage warehouse therein for storage only,' is not applicable to products upon which essential steps in manufacturing or processing are carried on during the period of storage, *but is applicable where nothing is done in connection with such storage except what is necessary for the preservation of the stored merchandise or agricultural products.*" (Parenthetical matter and emphasis added)

This interpretation was approved in *The B. F. Goodrich Co. v. Peck,* 161 Ohio St. 202, 118 N. E. 2d 525. We quote the second paragraph of the court's syllabus:

> "2. Property may be held 'for storage only' even though its owner intends at some subsequent time to

sell it or to use it as manufacturing material. (*General Cigar Co., Inc. v. Peck, Tax Commr.*, 159 Ohio St., 152 followed.)"

Briefly the facts of *Goodrich* were that the taxpayer was a foreign corporation storing merchandise and raw materials in Ohio. The merchandise was for sale in the state and the raw materials were for manufacturing in the state. Appellant, Youngstown Sheet and Tube Company also stores raw materials and finished products exactly as did Goodrich. The single point of difference between *Goodrich* and the present case is residence. Goodrich being a nonresident was excepted from the same tax that residents have had to pay. However, the tax is an *ad valorem* property tax levied exclusively against personal property *used in business in Ohio.* Patently, the residence of an owner has no substantial relationship to the business use of his property in the state.

An instance of discrimination paralleling that now before the court will be found in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 93 L. Ed. 1544, 69 S. Ct. 291. There the Ohio Tax Commissioner attempted to tax accounts receivable of a foreign corporation while excepting those of a domestic. As here, the difference between taxation and exception was the taxpayer's residence. The court said on page 572 of its opinion:

> "It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction *but solely because of the different residence of the owner.*" (Emphasis added)

And see *McHenry v. Alford*, 168 U.S. 651, 666, 42 L. Ed. 614, 18 S. Ct. 242; 1 *Cooley, Taxation*, 4th Ed. 717.

Finally, a decision of this court rendered June 24, 1957, also supports appellant's contentions. The issue in *Morey*

v. Doud, — U.S. ———, 1 L. Ed. (2d) 1485, 77 S. Ct. ——, hinged upon a state statute requiring firms in the business of selling or issuing money orders to secure a license and to submit to state regulation, while at the same time excepting the American Express Company from its provisions.

The court concluded that the firms were denied equal protection of the law, saying on page 1492 of the Law Edition report:

> "Of course, distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. This is so even where the discrimination is by name. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences'."

Residence of an owner is not a genuinely different characteristic of his business or his business property. The Ohio Supreme Court admitted as much in *The B. F. Goodrich Co., Inc., v. Peck*, 161 Ohio St. 202, 118 N. E. 2d 525, discussed above, when it commented on page 210 of its opinion:

> "There is much force to the argument of the Tax Commissioner that the decision of the Board of Tax Appeals (excepting foreign corporations from the tax) will discriminate against domestic corporations and against residents of Ohio. However, such an argument should be addressed to the General Assembly and not to this court." (Parenthetical matter added)

And in *Allied Stores of Ohio, Inc. v. Bowers*, 166 Ohio St. 116, 140 N. E. 2d 411 (see Appendix III), the holding of which was adopted as controlling for this case, the Ohio Supreme Court again recognized that the section was un-

constitutional, but nevertheless sustained it as in accordance with legislative intent. The court's syllabus holds:

> "Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitation, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment."

Application for rehearing was immediately filed, pointing out in paragraph fourth:

> "The single question before the court was whether in the light of the exception given to foreign corporations, residents should be accorded equal treatment by being relieved of the tax imposed upon them."

The application was denied on February 20, 1957.

Despite the presumed unconstitutionality of former Section 5701.08, Revised Code of Ohio, the court held that the section must nevertheless be sustained. Ultimately, then, the question is, can a tax properly be imposed under statutory provisions of a type which the Supreme Court of the United States has held unconstitutional and which the Ohio Supreme Court has conceded to be unconstitutional. Appellant believes that this question is substantial, particularly in view of its treatment by the Ohio court.

C. Cases Supporting Jurisdiction

The cases cited on pages 3 and 4 support the rule that this court has jurisdiction of an appeal where a constitutional question is raised at the first effective opportunity, or where it appears from the record that the question was raised. On the other hand, if the lower court decides the case on constitutional grounds or if the effect of its decision is to deny the constitutional claim, that in itself is

sufficient for jurisdiction. And, if the lower court attempts to base its decision on a supposed non-Federal ground, such ground must be adequate, not merely an effort to avoid the constitutional question.

From the lower court's opinion it might appear that the equal protection question was resolved on a nonfederal ground. In *Lawrence v. State Tax Commissioner*, 286 U.S. 276, 76 L. Ed. 1102, 52 S. Ct. 556, also involving equal protection, the Mississippi Supreme Court attempted to avoid the constitutional question by the same approach as the Ohio court, holding that if the statute were valid, the appellant could not complain, and if invalid, he would still be subject to the tax.

This court said on page 282 of its opinion:

> "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

To resolve any possible doubt as to jurisdiction, appellant requested the Ohio Supreme Court to certify and make a part of the record and its judgment the exact ground of its decisions on both the exports and equal protection questions. The statements as certified and journalized show that this court has jurisdiction. *Charleston Federal Savings and Loan Association v. Alderson*, 324 U.S. 182, 186 n. 1, 89 L. Ed. 857, 65 S. Ct. 624; *International Steel & Iron Company v. National Surety Co.*, 297 U.S. 657, 662, 80 L. Ed. 961, 56 S. Ct. 619.

Appellant submits in conclusion that this court has jurisdiction of the constitutional questions; that the questions were timely raised; and that they were admittedly passed upon by the Ohio Supreme Court.

Alternatively, should the court determine that it does not have jurisdiction, certiorari should be granted.

Respectfully submitted,

CARLTON S. DARGUSCH, SR.,
33 N. High St., Columbus 15, Ohio,
Attorney for Appellant.

APPENDIX I

Order of Tax Commissioner

(Dated March 2, 1955.)

This proceeding being the application of The Youngstown Sheet & Tube Company, an inter-county corporation, Youngstown, Ohio, for review and redetermination of an increased tangible personal property tax assessment for the year 1954, after being duly heard, came on to be considered.

The applicant herein, a domestic corporation, in making its 1954 inter-county corporation return of taxable property, eliminated from the average value of its manufacturing inventories reported therein, an amount representing the value of certain inventories of property owned by it and held in various storage facilities in this state for storage only. Upon audit, the average value of such excluded property consisting of, (a) iron ore at Lake Erie docks in Cuyahoga and Ashtabula counties, (b) iron ore, coal, scrap, limestone, fluor spar, ferros, and additions at the applicant's plant in Trumbull and Mahoning counties, and (c) finished seamless pipe at the applicant's plant in Mahoning county, was added back to the average value of manufacturing inventories as reported by the applicant. An increased assessment reflecting such action was issued for the year 1954.

The applicant filed this application for review and redetermination from such increased assessment, contending that the statutes purporting to levy a tax on merchandise held by it in storage facilities for storage only discriminate against it, and are, therefore, unconstitutional and void in that identical property, when held by a nonresident of this state for storage only, is excepted from taxation under the provisions of Section 5701.08, Revised Code, as construed in

the case of The B. F. Goodrich Co. v. Peck, 161 Ohio St., 202.

Subsequent to the issuance of the increased assessment here in issue and prior to the hearing on this application for review and redetermination, an audit was made of the applicant's books and records. As a result of such audit, certain increases were proposed in the value of applicant's property taxable in Schedules 2 and 3. The applicant's objections to such proposed increases were raised and developed at the hearing, and, in substance, are as follows:

1. To the inclusion in Schedule 2, as a part of taxable construction in progress, of an account captioned "engineering expense" which account the applicant maintains, represents fees and expenditures for the preparation and supervision of the preparation of drawings, including plans, specifications and other detail incidental thereto, and their execution, which services applicant claims are exempt from taxation under Section 5701.03, Revised Code, and Goodyear Aircraft Corporation v. Peck, 162 Ohio St., 200.
2. To the inclusion in Schedule 3 of the value of iron ores imported by the applicant from various foreign countries which ores, the applicant maintains, are immune from state taxation under the provisions of Article I, Section 10, Clause 2 of the United States Constitution.

Being fully advised in the premises, the Tax Commissioner finds that as an administrative official, he is without authority to pass on the question of the constitutionality of the statutes here involved, such being the province of the courts alone. Cincinnati, W. & Z. R. Co. v. Clinton County, 1 Ohio St., 77; State ex rel. Davis v. Hildebrant, 94 Ohio St., 154, 114 N. E. 55. Furthermore, the Tax Commissioner finds that as an administrative official, he must proceed in accordance with the terms and provisions of the statutes with which he is concerned with the assumption

of their constitutionality. East Ohio Gas Co. v. Public Utilities Comm., 137 Ohio St., 225, 28 N. E. 2d 599; Argo v. Kaiser, 66 O. L. Abs., 538, 118 N. E. 2d 162. Thus, the Tax Commissioner finds no error in the assessment here under review since the property assessed is subject to taxation under the existing provisions of Sections 5701.08, 5709.01, 5711.03, 5711.22 and correlated sections of the Revised Code.

Being further advised, the Tax Commissioner finds that the item of "engineering expense" is not exempt from taxation as personal property under the applicable statutes or the case of Goodyear Aircraft Corp. v. Peck, supra, and is, therefore, subject to taxation as a part of the value of personal property in the process of construction to which it relates.

With respect to the matter of import ores, the Tax Commissioner, being fully advised as to the facts incident to the importation and use thereof, finds that such ores have lost their identity as imports due to the fact that the import units thereof have been broken or mingled with domestic property. Thus, the Tax Commissioner finds that such ores are properly subject to state taxation. Hooven & Allison Company v. Evatt, 324 U. S. 652; 1946 O.A.G. 107.

Giving effect to the findings made herein, the Tax Commissioner finds that the true value of applicant's property taxable in Schedules 2 and 3 for the year 1954 is as follows:

Schedule	True Value
2	$44,733,598.00
3	28,800,157.00

It is, therefore, the order of the Tax Commissioner that a corrected assessment certificate be issued in accordance

with the findings made in this journal entry. Such certificate shall be final with respect to the assessment of all taxable property listed in the applicant's return.

Department of Taxation
/s/ Stanley J. Bowers
Tax Commissioner

APPENDIX II

Entry of the Board of Tax Appeals

(Dated April 30, 1956.)

This appeal is from a review and redetermination of an increased tangible personal property tax assessment covering the year 1954, made by the Tax Commissioner, against the taxpayer on March 2, 1955.

The cause now comes on for further and final consideration upon the commissioner's transcript, appellant's notice of appeal, a stipulation of facts, the record of a hearing had on August 29 last, exhibits, and briefs of counsel.

Youngstown Sheet, a domestic corporation, in making its 1954 intercounty corporate return of taxable property, eliminated from the average value of its manufacturing inventories reported, certain inventories of property owned by it and held in various storage places in this state for storage only. The Tax Commissioner, in his final order now complained of, found these withheld inventories to be includable. The inclusion of these inventories within the average value of its manufacturing inventories reported, presents two of the three questions now made before this board on review. The third question has to do with the further inclusion of certain "engineering expense" within the tax base, which appellant contends is exempt from taxation.

We shall delay any further recitation of facts, and make note thereof in our consideration of the three respective errors complained of. The property of the taxpayer, withheld by it from the average value of its manufacturing inventories, and incorporated therein by the Tax Commissioner exclusive of "engineering expense", consists of iron ore at Lake Erie docks, iron ore, coal, scrap, limestone, fluor spar stored at company plants in Trumbull and Mahoning counties, held exclusively for future use, and finished seamless pipe held at its Mahoning plant for subsequent sale. Appellant says of this property, that:

> "Appellee erred in including, as taxable merchandise belonging to appellant and held for storage only in this state for the reason that like property belonging to a nonresident is excepted from taxation by Section 5701.08 of the Revised Code, and same section (and related sections), purporting to levy a tax on merchandise belonging to residents of this state and held for storage only, is, therefore unconstitutional and void in that it denies appellant the equal protection of the laws to which appellant is entitled under the Constitution of the State of Ohio and the Constitution of the United States."

Appellee, upon review, considered that this, being the property of a domestic corporation, was, under the statute, includable within the tax base, and since the question made was a constitutional one, and that he, as an administrative officer, was not empowered to consider the question of the constitutionality of a statute, and was bound to administer the statutory law as he found it. He had no other course but to do as he did, that is, include this property within appellant's average inventory base. The Board of Tax Appeals is likewise not invested with power to consider questions as to the constitutionality of a statute. Hence, it must follow that this board can do nothing more than

affirm the Tax Commissioner on this phase of his order in the respect complained of, which is accordingly done. If appellant has been unjustly discriminated against, that is a matter solely for a court of competent jurisdiction to determine.

Appellant in its brief in chief assumes that this board lacks jurisdiction to consider its question of inclusion of imports in its average taxable inventory because it presents a constitutional question. The Board of Tax Appeals does not subscribe to this view. True, the answer to this question is to be found in the federal Constitution and adjudications of the federal courts; but, as we see it, the board is not required to declare a state statute in conflict therewith and therefore unconstitutional. We do not believe that any pertinent state statute conflicts with Article I, Section 10, Clause 2 of the federal Constitution. Appellee briefs this issue in its answer brief.

Revised Code Section 5709.01 provides in part, that

> "All personal property located and used in business in this state, * * *, are subject to taxation, * * *."

Revised Code Section 5711.01, reads in part, that

> "(A) 'Taxable property' includes all the kinds of property, * * *, mentioned in sections 5709.01 and 5709.02 of the Revised Code, * * *."

Revised Code Section 5711.03, which provides for the listing of taxable property, contains this provision:

> "Except as provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, all taxable property shall be listed as to ownership or control, valuation, and taxing districts * * *."

These Code provisions appear to be the only sections thereof that could possibly be in conflict with the federal constitutional provision. We make the following observa-

tions. The General Assemblies of Ohio were unquestionably familiar with the constitutional provision. They legislated with that thought in mind. Note that Revised Code Section 5709.01 reads, "all personal property *located and used in business* in this state". Is this imported property located in Ohio? Had it on tax listing date become a part of the general mass of personal property in this state? These two questions must be answered in the negative unless the facts disclose that these ores were not then in the hands of the importer or had ceased to retain their import character. The federal laws and cases relating to interstate commerce, and particularly those provisions relating to taxation of goods in transit, closely parallel the rules of taxation governing imports. No one can successfully maintain that goods in transit in interstate commerce, or temporarily delayed within a state, may be locally taxed. Yet such goods are then at least temporarily located within a state. Clearly the words used in Revised Code Section 5709.01 were intended to embrace only goods that had permanently found location in Ohio, and that had become a part of the general mass of property in the state, and devoted to business therein.

As said in Orphans' Asylum v. Board of Tax Appeals, 150 O. S. 219, it is this board's mandatory duty to see to it that no taxable property escape taxation, and that no property entitled to exemption from taxation be unlawfully taxed. True that was said in a real property exemption matter, however, the same is equally true of personal property. The court held that this board had jurisdiction therein and should have exempted the property under the provisions of a prior statutory contract, and Trustees of Dartmouth College v. Woodward, 17 U. S. 518, 4 L. Ed. 629.

Any number of cases involving imports have been considered by both state and federal courts. The law as ex-

pounded by the federal courts is fairly well established. We shall seek to follow the interpretation by federal courts as it pertains to taxation of imports.

The second question presented by appellant has to do with a portion of appellant's property held in storage. This property consists of imported ores. During the year covered by its 1954 tax return it held the following average monthly imported ore inventory during 1953:

Grade	Imported From	Average Inventory Value
(1) Brazilian Ore	Brazil	$ 503,161.39
(2) Cuban Ore	Cuba	34,571.46
(3) Mexican Ore	Mexico	58,345.68
(4) Liberian Ore	Liberia	5,367.52
(5) Seine River Ore	Canada	791,786.82
	Total	$1,393,232.87

Appellant purchased and imported these 5 grades of ore, the first 4 grades for use in its open hearth furnaces, the fifth grade for use in its blast furnaces. This ore was not purchased for resale. It was loaded in bulk in foreign ports into chartered vessels which carried but a single cargo and a single grade of ore. When the vessels reached a port of entry the ore was discharged from the vessel into railroad cars and transported in bulk by rail from port of entry to Youngstown, Ohio. Upon arrival in Youngstown the railroad cars were spotted at one or more of appellant's storage yards and there unloaded into separate storage piles and held for subsequent use as needed. A separate storage pile is maintained for each grade of imported ore and such ore is not commingled or mixed with other property of the taxpayer. These stock piles of separate grades of ores are located some distance from stock bins and furnaces. When the need arises for ore of a particular grade

it is taken from the particular grade stock pile, transported to and placed in the stock bins. When a subsequent shipment of bulk ore of the same grade is received it is placed in that gratle's stock pile; that is, all imports of Brazilian ore were placed in the Brazilian stock pile, Cuban ore in the Cuban stock pile, Mexican ore in the Mexican stock pile, Liberian ore in the Liberian stock pile, and Seine River ore in the Seine River stock pile. Hence, a stock pile of a particular grade may be diminished by a day's need and augmented the next by subsequently imported ore of the same grade. At all stages these ores are loaded, imported, reloaded into railroad cars and unloaded into grade stock piles and then reloaded and taken to stock bins as needed in bulk. It sought at all times to have a three months' supply of all grades of imported ore on hand.

At this point we wish it to be distinctly understood that this issue is presented on an agreed stipulation of facts. It will be decided strictly upon those facts. Such facts as are hereinbefore stated are taken directly from the agreed stipulated facts.

The taxpayer concedes that these imported ores lose their immunity from state taxation when they are removed from storage piles and placed in the stock bins, but insists that so long as these ores remain in their separate stock piles the state may not tax these imports. Appellant grounds its claim on Article I, Section 10, Clause 2 of the Constitution of the United States and various causes decided thereunder. The constitutional provision provides as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The question made calls for determination of two issues of fact. First, was the appellant the importer of these bulk iron ores? Second, whether or not these bulk ores, when received in Youngstown and placed in stock piles of the particular grade set apart for each respective grade and not mixed with other ores of different grades, and ores were taken therefrom as needed, and like grade of ore was subsequently added thereto, lost their distinctive character as imports, and have become subject to the taxing power of the state of Ohio. If the first query be answered in the negative, the second query becomes immaterial.

The facts of this case, as to how and in what manner, this ore was purchased, delivery made and payment effected, hardly need further comment other than to say that they are in substance parallel with those found in Hooven & Allison Co. v. Evatt, 142 O. S. 235, which was reversed by the United States Supreme Caourt. See 324 U. S. 652, 89 L. Ed. 1252. The dissenting opinion of Judge Bell in the state report, and the opinion of Chief Justice Stone in the federal report, set forth at length the conclusion of fact and law applicable thereto more succinctly, perhaps, than this board could do. Appellant, from the contracts of purchase of these ores in evidence, clearly appears to have procured the importation of these ores, and even though channeled through brokerage firms, it accepted title to these ores when loaded on board ship at the foreign port of shipment. Appellant then made payment of the major portion of the purchase price. It caused and paid import duties and charges, marine insurance covering these cargoes and other transportation charges. The brokerage firms simply acted as agents and facilitating mediums through which these contracts of purchase and sale were effected. The buyer at all times appears to have been Youngstown Sheet and Tube. Upon the facts present we

do not consider that it can be successfully maintained that appellant was not the importer of these ores.

The second query presents a far more difficult question, and one which may, on completion of the Seaway Canal to the Great Lakes and importation of Labrador ore, be of vital interest to Ohio's courts and industry. Had these ores lost, by the manner of their handling, their import character? If we were here dealing with, let us say, sugar imported in bags, in cargo lots and stock piled in warehouse, the solution of the question would be simplified. Carrying the illustration further, if 5,000 bags of sugar were contained in one shipment and stored for subsequent use or sale in warehouse, and the next day 500 bags were removed therefrom for use or sale, and the day following a second cargo of 5,000 bags of like kind and quality was received and added to the stock pile, there would unquestionably remain in the original containers in the stock pile 9500 bags of imported sugar. In the present case we are dealing with an imported commodity that economically, commercially and practically, cannot be packaged, but must be purchased in bulk in boat cargo or railroad car lots. Unlike sugar, its bulk and indestructibility from weather economically requires and permits its storage in open air stock piles. If we adopt the figures above used in the sugar illustration and denominate the bags as tons, we have 9500 tons of iron ore of a particular grade and kind remaining in the particular stock pile.

The exceptional men who produced the constitution, and the particular provision drawn in question could readily visualize, or had already experienced, that certain commodities would be imported in bulk which were not susceptible of packaging. Hence, they generally provided that no state should lay imposts or duties on imports until that property had lost its import character. They did not

limit the provision's applicability to packaged imports. They knew that metals were extracted from bulky ores and that such would probably be imported. Since that period numerous other products, such as petroleum, oils, gasoline, bananas, lumber, guano, phosphate, limestone, and other commodities are now imported in bulk lots, due to a like inability to economically package them.

The earliest and still the leading case, on interpretation of the constitutional section in issue, is that of Brown v. Maryland, 25 U. S. 419, 6 L. Ed. 678, in which Chief Justice Marshall says:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In a later case, said to be the leading "original package" case, Low v. Austin, 80 U. S. (13 Wall.), 29, 20 L. Ed. 517, Justice Field makes these two observations:

> "Indeed goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State Government.
>
> "Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the State."

From report of what are known as the "License Cases", Thurlow v. Mass., Fletcher v. R. I., Peirce v. N. H., 46

U. S. 504 (see 575), 12 L. Ed. 256, we learn that Chief Justice Taney argued for the state in Brown v. Maryland, supra, and that he thereafter sustained a change of mind. He therein concludes:

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as part of the mass of property in the State usually taxed for the support of the State Government."

Examination of numerous cases discloses that since decision of Brown v. Maryland, supra, and the "License Cases", there has been developed what is termed the "original package" theory. In Washington Chocolate v. King County, 21 Wash. (2d) 630, is found a well considered case in which many authorities are reviewed. Imports in this case were packaged articles. Its second syllabus succinctly sets up three situations developed by that theory:

> "Imported merchandise loses its constitutional immunity from state taxation,
>
> "(1) When it is no longer in the original package;
>
> "(2) When the importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state; and
>
> "(3) When it has been sold by the original importer to a purchaser, even though it remains in the original package."

We can find no fault with these conclusions. The question, however, which troubles us is: Whether or not imports in bulk, not susceptible of packaging, which constitute the entire cargo of the ship transporting the commodity to the port of entry, become subject to state taxation when unloaded from the ship. In answering this query, we have confined ourselves particularly to the only available reported decisions findable that had such bulk question squarely before them.

In Mexican Pet. Corp. v. City of S. Portland, 121 Me. 128, 115 Atl. 900, 26 A. L. R. 965, we find a case of bulk importation of oil decided upon the "original package" theory. Its syllabus holds:

> "Oil imported in tank steamers and pumped into receiving tanks belonging to the importer, for distribution by the owner of the tanks, has lost its character as an import and becomes subject to local taxation."

If this be a correct solution of that case, then by the same reasoning, the act of unloading any like bulk import is a severance of the import from the original package, which is the ship, and the import becomes a part of the general mass of property and loses its constitutional immunity the instant it is unloaded and enters the country. This is not true, however, under the original package theory if the commodity imported is packaged in containers. It does, therefore, appear, under the reasoning of the Maine case, that packaged imports are favored and have a preference over goods imported in bulk. We do not think that the constitutional inhibition made any such distinction. The court, in its next to the last paragraph of the Maine case, notes that at least two justices of the Supreme Court of New Jersey, in a nonreported case, under identical facts, are opposed to the Maine court's judgment.

Reverting to the case of Brown v. Maryland, supra, it must be noted that Chief Justice Marshall refrained from defining the term "original package", and went on to hold that goods "while remaining the property of the importer, in his warehouse, *in the original form or package* in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." It is also again noted that Chief Justice Taney in "License

Cases", supra, drops out the word "package" and employs only the term "*the form and shape*" in which they, the goods, are brought into the country, Justice Field, in the leading "original package" case, Low v. Austin, supra, adopts Taney's exact wording.

Four more recent authorities which have to do with importation of bulk ship cargo imports strongly commend themselves to us. All four causes note the Maine case, supra, and disagree with its conclusion. In, re Taxes Pacific Guano & Fertilizer Co., 32 Hawaii, 431 (441), the Supreme Court of the Territory says and holds:

> "The phosphate rock was brought in ships in bulk. It could not have been stored in original packages, for it did not come in any package whatever. It would be an undue stretch of language to say that the ships were the original package. The test as to 'original packages' does not apply in such cases. The phosphate rock, within the decision in the Maryland case, was in the warehouse of this taxpayer in the 'original form' in which it was imported, that is, it was in bulk, it was being kept in the warehouse in bins separate from the general mass of property in this Territory."

The second case is that of Galveston v. Mexican Pet. Corp., 15 Fed. (2d) 208. The court's opinion states that

> "Oil brought from Mexico, not for general and indiscriminate sale, but to fill contract already made, retains its character as import not subject to local taxation, though some small quantities were sold locally, when pumped into tanks from steamers from which it was shipped."

The third case is that of Philippine Refining Corp. of N. Y. v. County of Contra Costa, 24 Cal. App. (2d) 665, its syllabus reads:

> "Where an importer of coconut oil from the Philippine Island, having a place of business in another state, conducts such business by aggregating orders sufficient

to fill a tank or tanks in a steamer and, upon arrival of the oil at the point of transshipment in this state, it is placed in temporary storage facilities, from which it is then taken and delivered, in the form in which it arrives, but in agreed quantities, to the buyers throughout the United States, pursuant to the orders theretofore made, and none of the oil in such storage facilities is held for indiscriminate sale, or for any purpose other than solely incidental to its transportation to the prior purchasers, said oil is not subject to local taxation, and local taxes paid thereon under protest may be recovered as being in violation of article I, sections 8 and 10, of the federal Constitution."

The fourth case is that of Mexican Petroleum Corp. v. Louisiana Tax Commission, 173 La. 604 (see 614), 138 So. 117. This case deals with Mexican crude oil imported in tankers. When it reached the port of entry, it was heated to make more ductile and pumped into land storage tanks. Of the state's right to tax this import, the court says and holds:

"It is obvious, under the authorities cited, and especially under Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095, that, because the oil came to a state of rest at Destrehan to be there refined, it did not lose its character as an import. A more important question concerns the manner of importation. Our appreciation of Brown v. Maryland, and the authorities cited, resting upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the manner of importation, it suffices that the import, to retain its character as such, remain in the original form in which imported. Some property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages. It was not the intention, however, to exclude such property from the immunities of imports. Of this nature is crude oil. The only practical way of importing it is in bulk. To import it in barrels would make the oil too costly to be used in general

commerce, whether for heating purposes, or for the manufacture of important articles of gasoline, kerosene, asphalt, or other products. It is obvious that to deprive such importations of their immunities as imports would be a blow to the great oil industry, and, as a result, to the people thereof. The import clause of the Constitution was not no intended or designed."

Another case of interest is that of Southern Pacific Co. v. City of Calexico, 288 Fed. 624 (642). Although it has to do with importation of baled Mexican cotton, which had to be recompressed before shipment to England, the court states that in such cases:

"The controlling question is: Was the property kept segregated from the general mass of property in the state in such a way that it could always be identified, and not subject to any beneficial use?" (Such as hypothecation, which the court had in mind.)

We think it well to make some comment on the case of Sonneborn v. Curetin, supra. This was an original package interstate commerce case, and not one of foreign bulk importation. It is here important for two reasons. Chief Justice Taft therein succinctly sets forth the reasons that lie behind the difference in the rule applicable in interstate commerce transactions from that of foreign importations, as they apply to goods in their original package. At page 1098 of the Law Ed. report appears the following further pronouncement:

"It is the article itself to which the immunity attaches and whether it is in transit or is at rest, so long as it is in the form and package in which imported and in the custody and ownership of the importer, the state may not tax it."

The questions presented by appellant's second claim of error, that is, the matter of the taxability of bulk importations, have been previously inquired into by the old Tax

Commission and the Tax Commissioner of Ohio. In fact, the attorney general has twice been called upon for his opinion in such instances. See Attorney General's Opinions of 1928, Vol. 1, page 141, and of 1946, page 107. In the 1928 opinion the attorney general considered that flaxseed imported in bulk, for use by the importer in the manufacture of finished products, elevated from a ship's hold into large bins, from which the importer from time to time took sufficient flaxseed to supply its present needs as production required, lost its distinctive character as an import (the residue in bins) by reason of such withdrawals. In the second opinion a succeeding attorney general modifies his predecessor's views. We quote from the second opinion inasmuch as it raises the point here in issue which we think to be a vital point in this controversy.

"The importer should enjoy tax immunity for his imported goods so long as he retains them as undisturbed units. In Hooven & Allison Company v. Evatt, 324 U. S. 652, 89 L. Ed. Advance Opinions, 852, Mr. Chief Justice Stone in his opinion said:

"'Plainly if and when removed from the package in which they are imported, or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end.

"'If the imports be packaged goods, the package is the unit which must remain unbroken and used. If they be unpackaged, then the rule should remain the same with respect to each unit. In the case of fungible goods shipped in bulk, the better rule would seem to be that we regard the entire quantity of each person's importation or any separated unit thereof as the unit that must not be divided, mingled or otherwise used if tax immunity is to be retained. The vital factor seems not to be the breaking of a package, but the breaking up of an imported unit, the mingling of the whole or any part thereof with domestic property, or the use of the whole or any part of a unit. Hooven & Allison Company v. Evatt, supra.

> "'If this test be applied to the 1928 Attorney General's Opinion, the conclusion reached therein is sustained, for the form of the import is changed by using parts of the imported units from time to time in manufacturing.'"

As we read the excerpt taken from the Hooven & Allison case, we remember that the court therein was considering packaged goods, and of course if a package was opened and a part of its contents was used for the purpose for which it was imported, the balance of the goods in that package lost its identity as an import; but we do not understand that Chief Justice Stone was saying that all other units or all other originally packaged goods in the import thereby lost their import identity. This manner of reasoning would lead to the inconsistent conclusion that if one bag of sugar in an import of 500 bags is sold or consumed, that the remaining 499 bags thereby become subject to state taxation because the unit import has been destroyed. To our notion this is a complete departure from the original package theory, and attempts to create a new yardstick in its stead, that of "breaking up of an imported unit". Certainly, it disregards the rule of Brown v. Maryland which still appears to be the law of the land. The bulk importer would have but one recourse. He must sell or consume his entire ship's cargo in a single transaction or one operation. This newly conceived theory has one advantage. It would permit state taxation of that which the constitutional provision prescribes shall not be taxed. It further strikes us that if the Maine case, supra, is rightly decided, it effects the very practice which induced adoption of the constitutional provision, and that which it sought to prohibit, to wit, the taxing of an import by the state having the port of entry within its border of imports destined for use and consumption in an interior state.

This practice was then a very live issue. See Federalist Papers and Madison's Notes.

The rule, as we understand it, is that as found in the second, eighth and tenth syllabi of Hooven & Allison Co. v. Evatt, supra:

> 2. "The prohibition in Article I, Sect. 10, Cl. 2, of the Federal Constitution of state imposts or duties on imports necessarily extended to state taxation of things imported after their arrival, so long as they retain the character of imports and have not become a part of the common mass of property within the state.
>
> 8. "A manufacturer's stock pile of imported materials, stored in the original packages in a warehouse at the factory pending use in the manufacturing process, retains the character of imports entitled to constitutional immunity from state taxation.
>
> 10. "Imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported, or when the original packages in which they were imported are broken."

We find no authority, dealing with importations in bulk, that approves of the Maine court's reasoning and conclusion save and except that of Tres Ritos Ranch Co. v. Abbott, 44 N. M. 556, 105 P. (2d) 1070, 130 A. L. R. 963, which is readily distinguishable upon the determining factors that the imported cattle were no longer in the same form and had been commingled with the general mass of property in the state. The court also found as a matter of fact that the Ranch Company was not the importer, which could easily have been dispositive of the appeal. Although the Maine court grounds its conclusion on the opinions of Marshall, Taney and Field, it rests squarely upon the hypothesis that there is but a single test in all cases, that

being the "original package" theory. It entirely disregards that portion of those opinions which speak of *"the original form or package"*. The Supreme Court of the United States has not as yet held that the "original package" theory is the one and only test whether the import be packaged or *in bulk*. We feel that the Maine court, in its zeal to see that no property of a taxable class within its borders shall escape state taxation, adopts the only theory upon which the questioned property could be locally assessed.

It was never intended that packaged imports should have a preference over bulk imports, and that the latter, because of their weights and quantities, were not within the constitutional prohibition. It is fairly obvious that it would be rather absurd to require an importer of goods to stock-pile each identical merchandise importation separately. If he received a hundred identical shipments must he then have a hundred separated places of storage for the same identical article? We think not. Because perishable goods require inside storage, it does not follow that bulky non-perishable imports must be stored inside or under cover. To do so in many instances would entail prohibitive expenditures. If one may remove 500 bags of stored imported sugar from a storage warehouse, it would not follow that the 4500 bags left in storage of a 5,000 bag importation would destroy the import character of the 4,500 identical bags left remaining in storage. Neither do we see how the remaining stored imported sugar's import character would be destroyed by augmenting the stock pile by a second importation of identical sugar. What is true of sugar is equally true of imported ore in bulk. There is no mixing of grades, kinds or quality. Its import identity is undisturbed. The quantity always present in the stock

pile is as susceptible of mathematical computation on a per ton basis as are the number of bags of sugar in the stock pile.

Appellee, in the course of his answer brief, refers to two cases, one of which is F. May & Co. v. City of New Orleans, 178 U. S. 496, 44 L. Ed. 1165. This case is one dealing with whether or not the box or container in which the foreign producer packaged the imports, or the individually packaged articles contained within the box or container, were the "original package" and when broken the separately packaged imports contained therein lost their import character.

The second case advanced is that of E. J. Stanton & Sons v. County of Los Angeles, 78 Cal. App. (2) 181, 177 Pac. (2) 804. This we have carefully examined as well as the same court's earlier case of Dant & Russell, Inc. v. Bd. of Sup'rs. of Los Angeles Co., 128 P. 2d, 389. It is difficult to harmonize these two decisions. We do note the following pronouncements made in the Dant-Russell case:

> "The law is settled that a state or a subdivision thereof may not constitutionally levy a tax upon a thing during the time it retains its character as an import and remains the property of an importer in a warehouse in the original form or package in which it was imported.
>
> "The case of Mexican Petroleum Corp. v. City of South Portland, 121 Me. 128, 115 A. 900, 26 ALR 965, cited by respondent and apparently strenuously urged in the trial court, which reaches a contrary conclusion has been expressly disapproved as the law of this state. (See Philippine Ref. Corp. v. Contra Costa County, 24 Cal. App. 2d, 665, 669, 76 P. 2d, 163."

The Board of Tax Appeals, therefore, determines that the imported ores included by the Tax Commissioner

within the average monthly inventory base should not have been included therein. In so doing the commissioner erred.

* * * * * * * * * * * *

The constitutional issue of storage discrimination is affirmed for want of jurisdiction. The Tax Commissioner's order respecting the inclusion of imports in average monthly inventory values is reversed. The commissioner's order respecting engineering expense is affirmed.

APPENDIX III

YOUNGSTOWN SHEET & TUBE CO., APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

YOUNGSTOWN SHEET & TUBE CO., APPELLEE, *v.* BOWERS, TAX COMMR., APPELLANT.

1. If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, such protection cannot extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing.
2. The word "drawings" as used in Section 5701.03, Revised Code, does not necessarily include specifications relating to drawings.
3. Even though the cost of drawings does not determine their true value for personal property tax assessment purposes, such cost is some evidence of such value at least at a time while the items to which such drawings relate are being constructed and before the completion of those items.

4. Where a substantial cost in preparing a substantial number of drawings is included in the book cost of certain construction projects and where such book cost of such construction projects is taken as the value of those projects for personal property taxation purposes without any deduction therefrom for the value of such drawings, the Tax Commissioner cannot avoid the provisions of Section 5701.03, Revised Code, relating to "drawings" merely by arguments that he is only taxing the construction projects and that the books of the taxpayer show everything that is taxed as allocated to the cost of those projects.
5. Where the record on appeal to the Board of Tax Appeals from an order of the Tax Commissioner contains substantial evidence supporting the claim of the taxpayer, the order of the commissioner, to be sustained, must be supported by something more than a mere presumption in its behalf. (Paragraph three of the syllabus of *Block v. Glander, Tax Commr.*, 151 Ohio St., 381, approved and followed.)

(Nos. 34868 and 34872—Decided January 30, 1957.)

Appeals from the Board of Tax Appeals.

The Youngstown Sheet & Tube Company, herein referred to as the taxpayer, is an Ohio corporation. In its 1954 return, it eliminated from the average value of its reported manufacturing inventories certain inventories of property owned by it and held in various storage places in Ohio. The Tax Commissioner in his final order found these withheld inventories to be taxable. Furthermore, the Tax Commissioner in that order made no deduction from the tax base of any amount on account of "drawings" which the taxpayer claimed to be exempt from taxation.

On appeal to the Board of Tax Appeals, that board affirmed the order of the Tax Commissioner so far as it related to the "drawings." With respect to the property held in storage, the taxpayer had contended that that provision of Section 5701.08, Revised Code, which, prior to

September 30, 1955, read, "but merchandise * * * belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only," should have stricken therefrom the words "belonging to a nonresident of this state" for the reason that those words made such provision unconstitutional and that such provision when so revised excepted such property from taxation. The Board of Tax Appeals determined that it had no power to determine that any part of Section 5701.08, Revised Code, was unconstitutional and that it was therefore bound to render its decision in accordance with the provisions of that statute as it found them.

The taxpayer further contended that certain iron ores imported by it from foreign countries were exempt from taxation by reason of the provisions of Clause 2 of Section 10 of Article I of the Constitution of the United States. This contention was sustained by the Board of Tax Appeals.

The cause is now before this court on appeals by the Tax Commissioner and by the taxpayer from the decision of the Board of Tax Appeals.

Mr. Carlton S. Dargusch, Sr. and *Mr. Jack H. Bertsch,* for appellant in case No. 34868 and appellee in case No. 34872.

Mr. C. William O'Neill, attorney general, *Mr. Larry Snyder* and *Mr. Kiehner Johnson,* for appellee in case No. 34868 and appellant in case No. 34872.

TAFT, J. For the reasons stated in *Allied Stores of Ohio, Inc., v. Bowers, Tax Commr., ante,* 116, the taxpayer's contentions with respect to property held in storage must be rejected, except to the extent that the property so held represented iron ores imported by the taxpayer from foreign countries.

As to such iron ores, the claim for tax exemption is based upon that provision of Clause 2 of Section 10 of Article I of the Constitution of the United States which reads:

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * *."

That constitutional provision has been applied so as to prevent a state tax on property imported from outside the United States so long as it remains in the original package. *Hooven & Allison Co. v. Evatt, Tax Commr.*, 324 U. S., 652, 89 L. Ed., 1252, 65 S. Ct., 870; *Brown v. Maryland*, 12 Wheat., 419, 6 L. Ed., 678; *Low v. Austin*, 13 Wall., 29, 20 L. Ed., 517.

However, where the original package in which property was so imported has been broken, it has been held that the foregoing constitutional provision does not prevent imposition of a state tax upon the property which had previously been imported. *May v. New Orleans*, 178 U. S., 496, 44 L. Ed., 1165, 20 S. Ct., 976.

In the instant cases, it is not necessary to determine whether commodities, which are usually imported in bulk as is iron ore, may ever be exempt from state taxation by reason of that constitutional provision after such commodities have been taken from the ship or vessel that carried them to this country. Cf. *Mexican Petroleum Corp. v. City of South Portland*, 121 Me., 128, 115 A., 900, 26 A. L. R., 965, and *Tres Ritos Ranch Co. v. Abbott, Treas.*, 44 N. Mex., 556, 105 P. (2d), 1070, 130 A. L. R., 963, with *In re Taxes Pacific Guano & Fertilizer Co.*, 32 Hawaii, 431, and *Mexican Petroleum Corp. v. Louisiana Tax Commission*, 173 La., 604, 138 So., 117.

Although it does not appear that the Supreme Court of the United States has ever been called upon to determine

when fungible goods, such as iron ore, cease to be imports within the meaning of the foregoing constitutional provision (see annotation, 89 L. Ed., 1279, 1284 *et seq.*), that court has by its five to four decision in *May v. New Orlean, supra,* provided some guidance with respect to that problem. In that case, it was held that, where goods were packaged in small packages by a manufacturer and then packed in a larger package for shipment, such goods, although still in the unbroken smaller packages, were subject to state taxation as soon as the large shipping package had been broken.

In the opinion by Mr. Justice Harlan it is said:

"* * * the question in the present case is whether the plaintiffs, prior to the assessment complained of, had *so acted upon* the goods imported by them as to incorporate them with the mass of the property in the state, and bring them, while in their possession, within the range of local taxation.

"* * *

"* * * the 'original package' in the present case was the box or case in which the goods imported were shipped, and when the box or case was opened for the sale or delivery of the separate parcels contained in it, each parcel of the goods lost its distinctive character as an import and became property subject to taxation by the state as other like property situated within its limits."

In the instant cases, it appears from the agreed statement of facts that the taxpayer imported iron ores from five different countries; that these ores were purchased for use in the taxpayer's furnaces; that the taxpayer *maintained* a *supply* of each of these "ores *sufficient to meet* its *estimated requirements for* * * * *at least three months*"; that these ores were moved into a port of entry on vessels, each of which carried only one particular grade of ore; that, at the port of entry, the entire cargo of ore from a

particular vessel was discharged into railroad cars and transported in bulk to a *storage yard* in Youngstown, Ohio, *adjacent to the taxpayer's manufacturing facilities;* that there it was unloaded and placed in a separate storage pile in a separate area of the ore yard; that "a separate storage pile was maintained for each" of the five grades of imported ore and no such grade of ore was mingled with other ore or property "except that *different vessel shipments* of * * * ore" from a particular country *"were piled * * * on top of * * * other" ore* from that particular country *"as such* additional *shipments arrived";* and that "from time to time, *as needed, a portion* of the * * * ore *in each* separate *storage pile was removed* from such pile and transported to * * * stock bins" or "stock houses * * * for use in * * * furnaces * * * of the" taxpayer.

If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, we do not believe that such protection can extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing.

If, as held in *May v. New Orleans, supra* (178 U. S., 496), goods still in their original manufacturer's package are taxable notwithstanding Clause 2 of Section 10 of Article I of the Constitution of the United States, if they were shipped in a larger package and the larger package has been broken, we cannot comprehend how a shipment of iron ore shipped and received in this country in one vessel can be regarded as nontaxable by reason of that constitutional provision (1) after it has been mixed with other ore re-

ceived from another vessel and (2) after part of such iron ore has been separated from the whole for use in manufacturing.

The taxpayer's complaint with respect to the failure of the Tax Commissioner to make any deduction from the tax base of any amount on account of "drawings" is based upon Section 5701.03, Revised Code, which, prior to October 4, 1955, read so far as pertinent:

"* * * 'personal property' includes every tangible thing which is the subject of ownership * * * other than patterns, jigs, dies, drawings * * *."

The taxpayer's evidence as to the value of "drawings" is largely evidence as to the cost of drawings *and specifications*. The evidence in the record does not require the conclusion as a matter of law that the specifications referred to in this evidence of cost were part of the drawings. Actually, there is much that would support a conclusion that, although related to the drawings, the specifications were not a part of the drawings; and the Board of Tax Appeals apparently reached that conclusion. The statute relied on does not use the word "specifications."

However, the evidence does show conclusively that there were a very substantial number of drawings. Also, there is evidence disclosing that both the cost of such things as some of the "tracings, blueprints and supplies" and also the charges for some of the "detail draftsmen and tracers" amounted to several thousands of dollars. Without suggesting that there is no other evidence as to value or cost of the drawings, we believe that anyone will concede that these items represented part of the cost of these drawings. Even though the cost of drawings does not determine their "true value" for tax assessment purposes (see Sections 5711.21 and 5711.18, Revised Code), such cost is some evidence of such value, at least at a time as here while the items to

which they relate are being constructed and before the completion of those items.

Notwithstanding the foregoing evidence as to the inclusion of a substantial cost in preparing a very substantial number of drawings in the book cost of the construction projects, which was taken as the value of those projects for taxation purposes, no deduction at all from that book cost was made for the value of "drawings." In such an instance, the Tax Commissioner cannot avoid the provisions of the statute relating to "drawings" by arguments that he is only taxing the construction projects and that the books of the taxpayer show everything that is taxed as allocated to the costs of those projects. Such arguments were rejected by this court in *Goodyear Aircraft Corp. v. Peck, Tax Commr.*, 162 Ohio St., 200, 122 N. E. (2d), 700.

As stated in paragraph three of the syllabus of *Bloch v. Glander, Tax Commr.*, 151 Ohio St., 381, 86 N. E. (2d), 318:

"Where the record on appeal to the Board of Tax Appeals from an order of the Tax Commissioner contains substantial evidence supporting the claim of the appellant, the order of the commissioner, to be sustained, must be supported by something more than a mere presumption in its behalf."

It follows that as to case No. 34872 the decision must be reversed and that as to case No. 34868 it must be affirmed except to the extent that it relates to the claimed deduction from the tax base on account of "drawings," and the cause is remanded to the Board of Tax Appeals for further proceedings.

Judgments accordingly.

Weygandt, C. J., Zimmerman, Bell, Matthias and Herbert, JJ., concur.

Stewart, J., concurs except as to that portion of paragraph one of the syllabus between "(1)" and "(2)."

ALLIED STORES OF OHIO, INC., APPELLANT, *v.* BOWERS, TAX COMMR., APPELLEE.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, where the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

(No. 34926—Decided January 30, 1957.)

Appeal from the Court of Appeals for Cuyahoga County.

Allied Store of Ohio, Inc., herein referred to as the taxpayer, is an Ohio corporation. In an appeal to the Board of Tax Appeals from a final order of the Tax Commissioner, the taxpayer contended that the Tax Commissioner had erroneously assessed for taxation for the year 1954 certain "merchandise * * * held in a storage warehouse for storage only" within the meaning of those words as used in Section 5701.08, Revised Code, in effect prior to September 30, 1955, and that the statutes of Ohio were unconstitutional to the extent that they purported to levy a tax on such property not "belonging to a nonresident of" Ohio, in that they denied a resident such as the taxpayer the protection of the laws equal to that enjoyed by a nonresident. See *Little v. Smith, Atty. Genl.*, 124 Kan., 237, 257 P., 959, 57 A. L. R., 100; *Colgate v. Harvey*, 297 U. S., 404.

Section 5709.01, Revised Code, reads so far as pertinent:

"* * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof."

Section 5701.08, Revised Code, prior to September 30, 1955, read so far as pertinent:

"(A) Personal property is 'used' within the meaning of 'used in business' * * * when acquired or held as means or instruments for carrying on the business * * * or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is [are] not used in business in this state if held in a storage warehouse for storage only."

In its final entry, the Board of Tax Appeals stated in part:

"The only real point of difference between the present case and that of the *Goodrich case* * * * [161 Ohio St., 202, 118 N. E. (2d), 525] lies in that appellant is a domestic, or an Ohio corporation, engaged exclusively in merchandising, while the Goodrich company is a nonresident manufacturing corporation. * * *

"Since appellant's principal query concerns a matter of discrimination and the constitutionality of Revised Code Section 5701.08 * * *, matters over which this board is without jurisdiction to consider, this board can do nothing else but to affirm the Tax Commissioner's order as made * * *."

In affirming the decision of the Board of Tax Appeals, the Court of Appeals stated in part:

"The positive statement in Section 5701.08, Revised Code, that 'products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only' is not an arbitrary or artificial classification and is within the right and power of the Legislature to declare. See *City of Xenia v. Schmidt*, 101 Ohio St., 437 [130 N. E., 24]; *Travelers'*

Ins. Co. v. Connecticut, 185 U. S., 364. *Goodrich Co. v. Peck*, 161 Ohio St., 202 [118 N. E. (2d), 525], in effect so holds."

The cause is now before this court on appeal from the judgment of the Court of Appeals as a case involving a debatable constitutional question and pursuant to allowance of a motion to certify the record.

Mr. Carlton S. Dargusch, Sr., and *Mr. Jack H. Bertsch*, for appellant.

Mr. C. William O'Neill, attorney general, *Mr. Larry Snyder* and *Mr. Kiehner Johnson*, for appellee.

TAFT, J. Ordinarily, a constitutional question will not be considered unless it is necessary to consider such constitutional question in deciding the case before the court. In our opinion, it is not necessary to consider the constitutional question raised by the taxpayer in the instant case because, if its contention with regard to that question is sound, it necessarily leads to the conclusion that the entire proviso in subdivision (A) of Section 5701.08, which read, "but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only," was void and should be stricken. That being so, it is apparent that any of taxpayer's "merchandise * * * held in a storage warehouse for storage only" would be taxable because described by the preceding words remaining in the statute and reading, "stored * * * as * * * merchandise."

Of course, if only that portion of the proviso after the semicolon in subdivision (A) of Section 5701.08, which read, "belonging to a nonresident of this state," is stricken, the discrimination between residents and nonresidents would be eliminated; and then the proviso would

prevent taxation of the taxpayer's "merchandise • • • held in a storage warehouse for storage only." However, the question remains as to the power of this court to effect that result by striking only that portion of the proviso. In other words, if we assume that the taxpayer's contention that the discrimination beween nonresidents and residents contemplated by the words of the proviso would deny a resident the equal protection of the laws and must be eliminated, has this court the power to eliminate that discrimination by striking only that portion of the proviso reading, "belonging to a nonresident of this state"? If it does not have that power, the whole proviso must be stricken in order to eliminate that discrimination and then the taxpayer would obviously have nothing upon which to base its claim for the relief which it seeks.

Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language, if the elimination of such limiting language would substantially extend the operation of the legislative enactment beyond the scope contemplated by all the language of such legislative enactment.

In the opinion by Welch, J., in *State, ex rel. McNeal, v. Dombaugh, Clerk*, 20 Ohio St., 167, 174, it is said:

"It is by a mere figure of speech that we say an unconstitutional provision of a statute is 'stricken out.' For all the purposes of construction it is to be regarded as part of the act. The *meaning* of the Legislature must be gathered from all they have said, as well from that which is ineffective for want of power, as from that which is authorized by law."

In *State, ex rel. Wilmot, v. Buckley*, 60 Ohio St., 273, 296, 54 N. E., 272, it is said in the opinion by Burket, J.:

"* * * the court has no lawmaking power, and cannot extend a statute over territory from which it is excluded by the General Assembly. A court can hold a whole act unconstitutional because it is not broad enough * * *; but it cannot extend an act which is too narrow, so as to take in territory which was left out by the General Assembly."

In 11 American Jurisprudence, 855, Section 161, it is said:

"One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso, the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent."

See also *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, 46 L. Ed., 679, 22 S. Ct., 431; *State, ex rel. Wilson, Solr., v. Lewis, Aud.*, 74 Ohio St., 403, 78 N. E., 523; *State, ex rel. Squire, Supt. of Banks, v. City of Cleveland*, 150 Ohio St., 303, 336, 82 N. E. (2d), 709; *State, ex rel. English, v. Industrial Commission*, 160 Ohio St., 215, 217 *et seq.*, 115 N. E. (2d), 395; but see *State, ex rel., v. Baker*, 55 Ohio St., 1, 44 N. E., 516.

In the instant case, we do not have a legislative situation where the proviso was merely enacted as a part of a statute defining the objects to be subject to taxation. In such an instance, striking the words "belonging to a nonresident of this state" would merely prevent the tax from being extended as far as the General Assembly intended. By doing that, this court would not be extending the operation

of the statute so as to cover subjects or objects that the General Assembly did not intend to cover.

However, in the instant case, these taxing statutes, as originally enacted in 1931 (114 Ohio Laws, 714), did not contain the proviso which the taxpayer must necessarily rely upon for any relief *after* it has had this court remove from it the portion which it contends was invalid. The proviso was added by an amendment to the statute in 1933 (115 Ohio Laws, 548). See annotation, 66 A. L. R., 1483. Cf. *Frost v. Corporation Commission of Oklahoma*, 278 U. S., 515, 525, 73 L. Ed., 483, 49 S. Ct., 235; *Reitz v. Mealey, Commr.*, 314 U. S. 33, 38, 39, 86 L. Ed., 21, 62 S. Ct., 24; 11 American Jurisprudence, 841, 856, 857, Sections 154, 161. Prior to that amendment, the General Assembly had expressed an intention to tax any property "when stored or kept on hand as * * * merchandise." The amendment dealt with a withdrawal of some of that property from such taxation. The General Assembly provided only for withdrawal of "merchandise or agricultural products belonging to a nonresident," It did not provide for anything with respect to such merchandise or agricultural products belonging to a resident. If this court merely strikes the words "belonging to a nonresident of this state," the effect of that would be to provide for such a withdrawal of "merchandise or agricultural products" belonging to a resident; and it would thereby be substantially *extending* the operation of the legislative enactment beyond the scope contemplated by the legislative language. As the taxpayer recognizes in its reply brief, its contention is that "the *failure* of the Legislature *to extend* the exception to residents is" what was unconstitutional. By merely striking the words "belonging to a nonresident of this state," this court in effect would be exercising a legislative power which it does not have.

Therefore, if we assume that the proviso was unconstitutional and invalid because it denied to residents a protection of the laws equal to that enjoyed by nonresidents, it would be necessary to strike the whole proviso to eliminate that invalidity. If that is done, the taxpayer would not be entitled to any relief. It follows that the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

Stewart, Bell, Matthias and Herbert, JJ., concur.

Weygandt, C. J., and Zimmerman, J., concur in the judgment.

APPENDIX IV

Section 5701.08, Revised Code of Ohio.

As used in Title LVII of the Revised Code:

(A) Personal property is "used" within the meaning of "used in business" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only. Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are "used" when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

(B) "Business" includes all enterprises conducted for gain, profit, or income and extends to personal service occupations.

Section 5709.01, Revised Code of Ohio.

All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state, whether or not used in business, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property.

Section 5711.01, Revised Code of Ohio.

As used in sections 5711.01 to 5711.41, inclusive, of the Revised Code:

(A) "Taxable property" includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code, and also the amount of value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable property does not include such investments and deposits

as are taxable at the source as provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code, nor surrender values under policies of insurance.

Section 5711.03, Revised Code of Ohio.

Except as provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, all taxable property shall be listed as to ownership or control, valuation, and taxing districts as of the beginning of the first day of January, annually, except that deposits not taxed at the source shall be listed as of the day fixed by the board of tax appeals for the listing of deposits taxed at the source pursuant to Section 5725.05 of the Revised Code. The subsequent transfer of any taxable property shall not authorize any taxpayer to omit the same from his return nor the assessor to fail to assess the same in the manner required, although such return or assessment is not made until after such transfer. When a person becomes a taxpayer between the first day of January and the first day of July, in any year, he shall list all his taxable property as to ownership and taxing districts as of the date when he becomes such taxpayer, and as to valuation as of the next preceding first day of January, unless he shows to the assessor, under oath, and by producing a copy of the return or assessment, that the same property has been listed or assessed for taxation in that year in this or another state or country, or that such property has been received by him in exchange for property so assessed; but a person engaging in business between the first day of January and the first day of July in any year shall list the probable average amount of personal property intended to be used in business by him until the first day of January next thereafter.

APPENDIX V

THE BOARD OF TAX APPEALS
DEPARTMENT OF TAXATION
STATE OF OHIO

THE YOUNGSTOWN SHEET AND TUBE COMPANY, APPELLANT, v. STANLEY J. BOWERS, TAX COMMISSIONER, STATE OF OHIO, APPELLEE.

No. 28439

Stipulation of Facts

It is stipulated and agreed by and between counsel for the respective parties hereto that the following stipulation may be considered as the facts for all purposes pertinent to the consideration and decision of the above case, subject, however, to the right of either party to offer additional evidence concerning engineering expenditures including the value of drawings, specifications and other detail incident thereto.

1. The Youngstown Sheet and Tube Company, appellant herein, is a corporation organized and existing under and by virtue of the laws of the state of Ohio, with its principal office located in the Stambaugh Building, Youngstown, Ohio, and with plants for the manufacture of iron and steel (including products) in Mahoning and Trumbull counties, Ohio. Exhibits A and B attached hereto and made a part hereof.

2. The tax year in question is the year 1954, and the property covered thereby was listed as of January 1, 1954, except inventory, which was averaged on a twelve months basis for the calendar year 1953.

4. There was included by appellee, as taxable, for the year 1954 iron ores of a value of $1,393,232, which had been imported by appellant from foreign countries, namely, Brazil, Cuba, Mexico, Liberia, and Canada. Exhibit D attached hereto and made a part hereof. Said imported ores were kept adjacent to appellant's manufacturing facilities in a structure having two parallel walls, and on which there was located a movable ore bridge. (Exhibits A and B supra).

The Brazilian, Cuban, Mexican, and Liberian ores were purchased for ultimate use in appellant's open hearth furnaces, and the Seine River ore was purchased for ultimate use in appellant's blast furnaces. The Brazilian, Cuban, Mexican, and Liberian ores were transported by ocean vessels to the port of entry into this country, which was either Baltimore or Philadelphia. In the movement of these ores a steamship was chartered for each movement which involved only a single and particular grade of ore. The imported ore was loaded into the vessel at the foreign port and transported in bulk by such vessel to the port of entry. At the port of entry the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk by rail from the port of entry to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to the appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard where it was held for ultimate use in the open hearth furnaces of appellant.

The importation of the Seine River ore (a single and particular grade of ore) involved a lake vessel movement from a Canadian port to Cleveland, Ohio. The imported ore

was transported by vessel in bulk to the port of entry (Cleveland, Ohio). At Cleveland, Ohio the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk from Cleveland by rail to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard, where it was held for ultimate use in the blast furnaces of appellant.

A separate storage pile was maintained for each grade of imported ore, i.e. Brazilian, Cuban, Mexican, Liberian and Seine River, and such particular grade of imported ore was not commingled with other ore or property of the appellant except that different vessel shipments of identical ore were piled one on top of the other as such additional shipments arrived (i.e. Brazilian on Brazilian, Cuban on Cuban, Mexican on Mexican, Liberian on Liberian, and Canadian on Canadian).

From time to time, as needed, a portion of the imported ore in each separate storage pile was removed from such pile and transported to the stock bins in the case of the blast furnaces and stock houses in the case of the open hearth furnaces for use in said blast furnaces and open hearth furnaces of the appellant. Exhibits A and B supra.

Appellant maintained a supply of imported ores sufficient to meet its estimated requirements for a period of at least three months.

5. There was included by appellee, as taxable, for the year 1954 certain tangible personal property, consisting of raw materials and finished seamless pipe, as set forth in Exhibit E, attached hereto and made a part thereof.

Said tangible personal property consisted of:

(a) Iron ore, produced in the United States and stored (in a rectangular structure having four walls and on two walls of which there was located a movable ore bridge) on Lake Erie public docks at Ashtabula, Ashtabula county, and Bedford, Cuyahoga county, and held for ultimate use in manufacturing. The Lake Erie public docks at Bedford (Cuyahoga county) were owned, controlled and operated by the Erie Dock Company, and the Lake Erie public docks at Ashtabula (Ashtabula county) were owned, controlled and operated by the Ashtabula and Buffalo Dock Co.

(b) Raw materials consisting of iron ore, coal, scrap, limestone, fluor spar, ferros and additions stored adjacent to appellant's manufacturing facilities in Trumbull and Mahoning counties and held for ultimate use in manufacturing by appellant. The domestic iron ore at appellant's manufacturing facilities was stored in the same manner and in the same type of structure as the imported ore. The appellant's properties in Trumbull and Mahoning counties were enclosed by wire fences and other enclosures.

(c) Finished seamless pipe manufactured in Ohio and stored in the pipe storage yard adjacent to appellant's manufacturing facilities in Mahoning county and held for ultimate sale by appellant.

With the exception of the iron ore stored on Lake Erie public docks, all inventories were located on properties of appellant and were under its control at all times. Exhibits A and B supra.

The raw materials, consisting of domestic and imported iron ore, coal, scrap, limestone, fluor spar, ferros and additions, were in saleable form, as was the finished seamless pipe. Said raw materials were not held by appellant for resale but were held by the appellant for use in manufacturing. The finished seamless pipe was held for ultimate sale by appellant.

6. The assessments made by the Tax Commissioner by preliminary assessment certificate, dated August 23, 1954, by amended preliminary assessment certificate, dated August 30, 1954, and as determined in the journal entry, dated March 2, 1954, were as set forth on the "Summary of valuations by taxing district". Exhibit F attached hereto and made a part hereof.

7. As used herein, the words, "imported" or "importation", shall not be deemed to be dispositive of the question in issue as to whether the subject ores imported from Brazil, Cuba, Mexico, Liberia, or Canada retained their characteristics as imports immune from state taxation where said ores had been commingled in the ore yards of appellant with ores of the same kind (i.e. Brazilian with Brazilian, Cuban with Cuban, Mexican with Mexican, Liberian with Liberian, and Canadian with Canadian) from other separate vessel shipments and where a portion of such commingled ores had been withdrawn for use in the blast or open hearth furnaces of appellant.

8. All values, as set forth in Exhibits C to E, inclusive, are book values taken from appellant's books.

C. William O'Neill,
Attorney General, State of Ohio,
Larry H. Snyder,
Assistant Attorney General, State of Ohio,
Attorneys for Tax Commissioner of Ohio.
Carlton S. Dargusch, Sr.,
Attorney for The Youngstown Sheet and Tube Company.

(NOTE: *The exhibits and unrelated material have been omitted.*)

APPENDIX VI

SUPREME COURT OF OHIO

YOUNGSTOWN SHEET AND TUBE COMPANY, APPELLANT, v. STANLEY J. BOWERS, TAX COMMISSIONER, STATE OF OHIO, APPELLEE.

Certificate

On motion of appellant, Youngstown Sheet and Tube Co., the court orders it to be certified and made a part of the record of the proceeding and of the judgment in this cause that the Tax Commissioner, by his appeal to this court from the Board of Tax Appeals of Ohio, placed in issue the constitutionality of Sections 5711.03, 5701.08, 5709.01, and 5711.01 of the Ohio Revised Code, as to whether appellant's iron ore imports were taxable under those sections, or protected therefrom by Article I, Section 10, Clause 2 of the United States Constitution as imports; that this court, pursuant to appeal, and upon the record, briefs of counsel and oral argument, reversed the Board of Tax Appeals of Ohio, which had held that appellant's iron ore imports were protected from the application of the above sections, and in turn held that the sections did tax appellant's iron ore imports; that upon consideration of the same, the court was of the opinion and accordingly decided, that the said statutes were not invalid by reason of taxing appellant's iron ore imports and were not repugnant to the United States Constitution in so taxing; and that a determination of that question was appropriate and necessary to a decision in this case.

Witness the Honorable Supreme Court of Ohio, this twentieth day of May, 1957.

Supreme Court of Ohio
Carl V. Weygandt,
Chief Justice of the Supreme Court of Ohio.

Certificate

On motion of the appellant, Youngstown Sheet and Tube Co., it is ordered to be certified and made a part of the record of the proceeding and of the judgment of the court in the cause that by its appeal from the Board of Tax Appeals, the appellant placed in issue the constitutionality of former Section 5701.08, Revised Code of Ohio, contending that the said section as enacted and as construed and applied denied appellant (a resident corporation) equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the United States Constitution for the reason that it taxed storages only of resident corporations while excepting the same property of non-resident corporations, and that the court found, pursuant to appeal, briefs and oral argument of counsel, (and by its decision in Allied Stores of Ohio, Inc. v. Bowers, 166 O. S. 116) that despite such alleged discrimination it was without jurisdiction to provide relief; that to do so would result in amending the section to include appellant within the exception; that therefore the section must stand; that so standing and so construed the section was not repugnant to the United States Constitution or if repugnant, had nevertheless to be sustained in accordance with the intent of the General Assembly, even though discriminatory; and that this holding was appropriate and necessary to the court's decision.

Witness the Honorable Supreme Court of Ohio, this twentieth day of May, 1957.

Supreme Court of Ohio,
Carl V. Weygandt,
Chief Justice of the Supreme Court of Ohio.

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No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OPPOSING MOTION TO DISMISS

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MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 588

THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OPPOSING MOTION TO DISMISS

The Tax Commissioner raises two points in his motion to dismiss. First, that removal of any part of appellant's imported ore from the storage pile to the stock houses and stock bins for eventual use in manufacture, destroys the import character of the remainder, as well as every identical successive shipment stored on top of it. Appellant has already discussed this point in its jurisdictional statement, and can only add here that no one imports for the sake of importing. It is a foregone conclusion that the imports will ultimately be used, and this is true of every import. Moreover, a commingling of new with old packaged imports has never been deemed a domestication, even though some packages may have been removed from the older shipment. No reason or authority is cited for the distinction the commis-

sioner claims to draw between bulk fungible and packaged imports.

Secondly, it is argued that the Ohio court was merely making a finding of fact. Whether the finding was of fact or law or mixed, the practice employed by appellant is so commonly used in those businesses and industries which import bulk fungibles that the court's holding is of widespread interest. The facts of this case are not peculiar to this taxpayer.

Respectfully submitted,

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No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

On Appeal from the Supreme Court of Ohio

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 9

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Board of Tax Appeals of Ohio, unreported, is set forth in R., 8-25. The opinion of the Supreme Court of Ohio (R., 25-31) is reported in 166 Ohio St. 122, 140 N. E. 2d, 313.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered January 20, 1957 (R., 25). Application for rehearing was filed February 13, 1957 (R., 32). Rehearing was denied by order entered February 20, 1957 (R., 1, 46). Notices of appeal to this Court were then filed with the Supreme

Court of Ohio on April 30, 1957 (R., 2, 48). On June 25, 1957 the Supreme Court of Ohio extended the time for filing appellant's jurisdictional statement and record until August 3, 1957. On July 29, 1957, the Court granted a further extension of time until September 30, 1957. And on October 1, 1957 a final extension was ordered until October 31, 1957 (R., 45, 62). The jurisdictional statement and record were filed October 30, 1957, and probable jurisdiction was noted by order of this Court on January 6, 1958 (R., 63). The jurisdiction of the Court rests on 28 U. S. C., 1257 (2).

QUESTIONS PRESENTED

1. May a state statute constitutionally impose an *ad valorem* property tax upon bulk iron ores which have been imported from foreign countries and which were stored in the same form as imported, not commingled with other property of the taxpayer.

2. Does a state statute deny residents of the state the equal protection of the laws under the Constitution of the United States by imposing an *ad valorem* property tax upon residents' storage merchandise held for storage only, while at the same time excepting the storage merchandise of non-residents when similarly held for storage only?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Two constitutional provisions are involved. The first is Clause 2, Section 10, Article I of the Constitution of the United States which provides:

> "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws * * *."

The second constitutional provision is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> "Section 1. * * * No state shall * * * deny to any person within its jurisdiction the equal protection of the laws."

The state statutes involved are Sections 5709.01, 5711.01, 5711.03, and former Section 5701.08, Revised Code of Ohio, which are set forth in Appendix I to this brief.

STATEMENT

The facts of this case have been stipulated (R., 33-36, 51-53). Appellant is an Ohio corporation having its principal office in Youngstown, Ohio, and with facilities for manufacturing iron and steel in Mahoning and Trumbull Counties, Ohio.

The tax return in question is that for the year 1954 and the iron ores, both imported and domestic, were listed in the return and assessed for taxation on the basis of their average monthly value by taking their values as of the last business day of each month during the preceding calendar year 1953, adding them together, and then dividing the total by 12, so as to obtain the average value.

Insofar as pertinent to the iron ores imported by appellant and held in storage, the stipulation (R., 33-36) reads:

> "4. There was included by Appellee, as taxable, for the year 1954 iron ores of a value of $1,393,232, which had been imported by Appellant from foreign countries, namely Brazil, Cuba, Mexico, Liberia and Canada. Exhibit D attached hereto and made a part hereof. Said imported ores were kept adjacent to Appellant's manufacturing facilities in a structure having two parallel walls, and on which there was located a movable ore bridge. (Exhibits A and B, supra).

"The Brazilian, Cuban, Mexican, and Liberian ores were purchased for ultimate use in Appellant's open hearth furnaces, and the Seine River ore was purchased for ultimate use in Appellant's blast furnaces. The Brazilian, Cuban, Mexican and Liberian ores were transported by ocean vessels to the port of entry into this country, which was either Baltimore or Philadelphia. In the movement of these ores a steamship was chartered for each movement which involved only a single and particular grade of ore. The imported ore was loaded into the vessel at the foreign port and transported in bulk by such vessel to the port of entry. At the port of entry the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk by rail from the port of entry to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to the Appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard where it was held for ultimate use in the open hearth furnaces of Appellant. The importation of the Seine River ore (a single and particular grade of ore) involved a lake vessel movement from a Canadian port to Cleveland, Ohio. The imported ore was transported by vessel in bulk to the port of entry (Cleveland, Ohio). At Cleveland, Ohio the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk from Cleveland by rail to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to Appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard, where it was held for ultimate use in the blast furnaces of Appellant.

"A separate storage pile was maintained for each grade of imported ore, i.e. Brazilian, Cuban, Mexican, Liberian and Seine River, and such particular grade of imported ore was not commingled with other ore or property of the Appellant except that different

vessel shipments of identical ore were piled one on top of the other as such additional shipments arrived (i.e. Brazilian on Brazilian, Cuban on Cuban, Mexican on Mexican, Liberian on Liberian, and Canadian on Canadian).

"From time to time, as needed, a portion of the imported ore in each separate storage pile was removed from such pile and transported to the stock bins in the case of the blast furnaces, and stock houses in the case of the open hearth furnaces for use in said blast furnaces and open hearth furnaces of the Appellant. (Exhibits A and B supra).

"Appellant maintained a supply of imported ores sufficient to meet its estimated requirements for a period of at least three months."

We turn now to the provisions of the stipulation concerning the domestic ores held in storage (R., 51-53):

"5. There was included by Appellee, as taxable, for the year 1954 certain tangible personal property, consisting of raw materials and finished seamless pipe. (sic) as set forth in Exhibit E, attached hereto and made a part hereof.

"Said tangible personal property consisted of:

"(A) Iron ore, produced in the United States and stored (in a rectangular structure having four walls and on two walls of which there was located a movable ore bridge) on Lake Erie public docks at Ashtabula, Ashtabula County, and Bedford, Cuyahoga County, and held for ultimate use in manufacturing. The Lake Erie public docks at Bedford (Cuyahoga County) were owned, controlled and operated by the Erie Dock Company, and the Lake Erie public docks at Ashtabula (Ashtabula County) were owned, controlled and operated by the Ashtabula and Buffalo Dock Co.

"(b) Raw materials consisting of iron ore, coal, scrap, limestone, fluor spar, ferros and additions stored adjacent to Appellant's manufacturing facilities in Trumbull and Mahoning Counties and held for ultimate use in manufacturing by Appellant. The domestic iron ore at Appellant's manufacturing facilities was stored in the same manner

and in the same type of structure as the imported ore. The Appellant's properties in Trumbull and Mahoning Counties were enclosed by wire fences and other enclosures.

"(c) Finished seamless pipe manufactured in Ohio and stored in the pipe storage yard adjacent to Appellant's manufacturing facilities in Mahoning County and held for ultimate sale by Appellant.

"With the exception of the iron ore stored on Lake Erie public docks, all inventories were located on properties of Appellant and were under its control at all times. (Exhibits A and B supra).

"The raw materials, consisting of domestic and imported iron ore, coal, scrap, limestone, fluor spar, ferros and additions, were in saleable form, as was the finished seamless pipe. Said raw materials were not held by Appellant for resale but were held by the Appellant for use in manufacturing. The finished seamless pipe was held for ultimate sale by Appellant."

The Board of Tax Appeals of Ohio reversed the Tax Commissioner's assessment against appellant's imported ores and affirmed the assessment against the domestic ores, raw materials and finished merchandise. Upon appeal, the Supreme Court of Ohio reversed the Board of Tax Appeals as to the imported ores and affirmed it as to the remainder of the items in issue.

SUMMARY OF ARGUMENT

IMPORTS

1. Imported bulk fungibles are entitled to protection under the imports clause equal with that accorded packaged goods. Such fungibles do not lose their character as imports any sooner than packaged goods and while they are stored by the importer in the same form they had when imported, and not yet used for the purpose, either sale or manufacture, for which they were imported, they are im-

mune from state taxation, *Brown v. Maryland,* 12 Wheat. 19 (1827); *Low v. Austin,* 13 Wall. 29 (1871); *The License Cases,* 5 How. 504 (1847); *East Ohio Gas Co. v. Tax Commission of Ohio, et al.,* 283 U. S. 465 (1931); *Hooven & Allison Co. v. Evatt,* 324 U. S. 652 (1945).

2. The rule of *Brown v. Maryland, supra,* as applied to imported bulk fungibles, is also supported by the state Court decisions which have been based upon it, and by the relatively few instances in which the rule has been the subject of litigation ever since its formulation 130 years ago.

3. The line drawn by decisions of this Court marking the point at which an import becomes taxable is both practical and reasonable. That the line might have been drawn differently is not so important as the fact that it has been drawn, and that it has been adhered to in successive cases, both federal and state. It affords a fair and workable standard for tax administrators and taxpayers, alike, without the necessity of every importer of raw materials resorting to continual litigation.

4. The decision of the Ohio Supreme Court imposes an unwarranted distinction between bulk fungibles and packaged imports by holding that shipments of bulk fungible imports lose their tax immunity when stored with different shipments of the same type or grade of commodity imported from the same country, and when a part of a shipment is removed for use.

5. The decision of the Ohio Supreme Court has the further disadvantage that it gives seaboard states a tax advantage over interior states, *The License Cases,* 13 Wall. 29 (1871), because the decision would subject bulk fungibles to local taxation almost immediately after their importation, even while held in storage at the port of entry.

6. Under Ohio law, the tax status of raw materials like the iron ores here in question is determined on the last

day of each month. If on that tax day, the imported fungibles are in storage in the same form as imported and not used they are exempt from tax, even though they may subsequently be used, *People v. Commissioners*, 104 U. S. 466 (1881); *Coe v. Errol*, 116 U. S. 517 (1886); *Leisy v. Hardin*, 135 U. S. 100 (1889); *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 (1945).

7. Control and taxation within the area of foreign commerce was granted to the federal government exclusively by the Constitution, and because of this country's dependence upon imported goods, it is of vital importance that the federal government, not the states, retain control, and that the area of foreign commerce be free within the various states and territories.

EQUAL PROTECTION

1. Section 5701.08, Revised Code, is unconstitutional for the reason that it taxes personal property held by a resident for storage only while at the same time excepting such property when owned and stored by a non-resident with the result that residents are denied equal protection of the laws.

2. The residence of a taxpayer is not a characteristic of the property being taxed or of the type of business in which the taxpayer engages in this state. Where the tax is against property used in business, a classification of taxpayers to be valid must rest upon some difference in the quality or kind of property owned and the business use to which it is put by the taxpayer in the taxing state.

3. Taxpayers who own the same kinds of property and who use that property in the same ways for the same business purpose belong to the same class and must be treated equally.

4. The exception from tax granted to non-residents for personal property held for storage only is an integral part of Section 5701.08, Revised Code of Ohio, and cannot be severed from that section. When the Ohio Legislature came on to reconsider the exception in 1955, it amended it in certain respects but did not remove it. The only part of the exception which was removed was the language which limited the benefit of the exception to nonresidents and which discriminated against residents. Thus if any language can be removed from the statute, it is the phrase, "belonging to nonresidents of this state", since the Legislature by its action has indicated that it does not consider such language to be a necessary part of the exception.

5. Section 5701.08, Revised Code of Ohio, is unconstitutional insofar as it imposes a discriminatory tax upon the business property of residents held for storage only and must to that extent be voided.

ARGUMENT

I

IMPORTS

A. Imported Bulk Fungibles Do Not Lose the Immunity Granted Them Under Article I, Section 10, Clause 2 of the Constitution of the United States So Long As They are Held by the Importer in Storage and Not Used for the Manufacturing Purpose for Which They were Imported.

In deciding this case, the Ohio Supreme Court departed radically from the principle adopted by this Court in *Brown v. Maryland*, 12 Wheat. 419 (1827) and subsequent decisions which will be discussed below. Through paragraph 1. of its Syllabus the Ohio Court held:

> "1. If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such is iron ore as is accorded to goods imported in a package, such protection cannot extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing."

There is, of course, no authority at all to support the Court's prefatory holding which infers that imported fungibles are not entitled to the same constitutional protection as that accorded imported goods in packages. The Constitution speaks of "imports", without distinguishing between those which are fungible in character and those which are

packaged in one way or another. Every import, bulk and packaged alike, is entitled to the same constitutional immunity. Accepting that to be the correct and self-evident rule, the test proposed by the Ohio Court for determining the point after which imported fungibles lose their immunity cuts squarely across the test set down by this Court in *Brown v. Maryland, supra,* which holds that every import is exclusively within the federal domain so long as it is stored by the importer in the same form as imported and not sold or used.

We note at the outset that although *Brown v. Maryland, supra,* has been applied most frequently to packaged imports, the doctrine formulated by Chief Justice Marshall is not so limited, but applies with equal force to all imports so long as they retain their original form. Thus at page 441 and 442, the following appears:

> "It is sufficient for the present to say, generally, that when the importer has so *acted upon* the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the *original form* or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." (Emphasis added)

In the later case of *Low v. Austin,* 13 Wall. 29 (1871), at page 34 of its opinion, the Court quoted with approval the comment of Chief Justice Taney in *The License Cases,* 5 How. 504, 574 (1874), thus:

> "Indeed, goods imported, while they remain in the hands of the importer, in the *form and shape* in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State Government.'" (Emphasis added)

And in *American Steel & Wire Co. v. Speed*, 195 U. S. 500 (1904), Justice White stated the rule of *Brown v. Maryland* with approval on page 521 as follows:

> "Thus, in *Brown v. Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such."

See also *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 509 (1922).

The facts of the instant case show that the appellant imported ores from several foreign countries. Each shipment came by steamship to a port of entry where it was loaded into railroad cars and carried on to appellant's storage yards at Youngstown, Ohio. Here the shipment was removed from the cars and placed in a separate pile for storage. Subsequent shipments of identical ore, imported from the same country, were stored in the same pile, but there was no commingling whatever with domestic ores or other property of appellant. A supply of imported ores to meet requirements for at least three months was maintained at all times. Nothing was done to the ore during its storage, and so far as concerns its form while in storage, it could as well be on the dock at the port of entry, or for that matter, on the dock at the port of export. From time to time, some of the ore was removed from the piles and taken to a stock bin or stock house, and from there it was withdrawn and introduced directly into the furnaces. To avoid complicating the issue unduly, the taxability of the ores in the bins and houses has not been contested by the appellant. However, the attempt by Ohio to tax the ores which remained in storage in the storage yards, separate

from the rest of appellant's property and in the same form as it was when imported, is an unconstitutional extension of the state's power in derogation of that granted the federal government by the Constitution of the United States.

Two cases decided by this Court come so close on their facts to the present as to be indistinguishable for all practical purposes. The first is *East Ohio Gas Co. v. Tax Commission of Ohio, et al.*, 283 U. S. 465 (1931). Although dealing with interstate commerce, the Court applied the analogy and rationale of the original package or form doctrine in arriving at its conclusion. Natural gas, a fungible, was transported in interstate commerce by means of pipes to distribution stations. The gas was then stored in these pipes adjacent to the stations until, as the occasion demanded, a quantity would be released and moved through the distribution stations, where it was changed in form by being relieved of nearly all pressure, and thence it was sold to consumers. The Court wrote on page 471 of the opinion:

> "The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."

But the gas remaining in the pipes ahead of the distribution stations, in the original form, was held to be still an object of interstate commerce and immune from tax. So here, such portions of ore as are broken from appellant's storage piles and moved to the stock bins and stock houses at the plant, preparatory to the manufacture of steel, may possibly be taxable, but certainly not the ore which stays in storage in the storage piles. As to it, there has been no manufacture, and should the need arise, the

ore could just as easily be shipped on to another storage site, or to another plant in another state for use there in manufacturing. See also Justice Holmes' analysis in *State Tax Com. v. Interstate Natural Gas Co.*, 284 U. S. 41 (1931).

The second authority upon which the appellant relies is *Hooven and Allison Co. v. Evatt*, 324 U. S. 652 (1945). The principles established by that case are found on page 665 thereof:

> "Plainly if and when removed from the package in which they are imported, *or when used for the purpose for which they are imported*, they cease to be imports and their tax exemption is at an end." (Emphasis added)

And on page 666, the principle is reiterated:

> "This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state tax at or when they are *subjected to the manufacture for which they* were *imported*, * * *, *or* when the original packages in which they were imported are broken, * * * But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported are liable to state taxation." (Emphasis added)

Examination of the record will disclose that in this case, the imported ores, while stored in appellant's ore yards, were not in any sense being used in the manufacture for which they had been imported.

In the *Hooven & Allison* case the taxpayer imported bales of hemp and other fibers, and stored them in its warehouse at its Ohio factory, preliminary to their being used in manufacturing cordage and similar products. As needed, the hemp and fibers were taken from storage and processed pursuant to manufacture. Now in the present

case, the Ohio Court has sustained the same Ohio *ad valorem* property tax against appellant's imports as was struck down by this Court in *Hooven & Allison*, even though the imports here are stored and handled in exactly the same way as the hemp and fibers were in *Hooven & Allison*. To be sure, the Ohio Court has shifted its ground and reasoning, but the effect of its holding is to revert to the position it took in *Hooven & Allison*, and which this Court reversed.

Why iron ores, or any other raw materials which because of their very nature are required to be imported in bulk should be denied, before sale or use, the same protection from state taxation as that granted by the Constitution to less bulky imports, the Ohio Court did not pause to explain. The Constitution by its terms expressly protects *all* imports, and just as a package is not broken until it is opened, nor sold until it is bought, so raw materials imported in bulk are not changed in form or subjected to the manufacture for which they were imported until they are used in processing, and this irrespective of the Ohio Court's notion, that somehow the processing of a part "processes" the whole.

Neither can it make any substantial difference that the storage yards are near the plants at Youngstown. In *East Ohio Gas, supra*, the supply pipes ran up to the distribution stations, and in *Hooven & Allison Co. v. Evatt, supra*, the taxpayer's storage warehouses abutted the manufacturing area. Chief Justice Stone, writing for the court, pointed out on page 664 of the opinion:

> "For the purposes of the immunity it has not been thought, nor is there reason for supposing, that it matters whether the imported merchandise is stored in the original package in the importer's warehouse at the port of entry or in an interior state."

Another decision of this Court, *Gulf Fisheries v. MacInerney*, 276 U. S. 124 (1928) bears upon the problem at hand. There the Court, speaking through Justice Brandeis, held that fish imported in bulk ceased to be imports after they had been processed by being beheaded, gutted, gilled and iced. The implication which must be drawn is that prior to such time, and while they were in storage, they were imports and continued so until actually subjected to the processing operations.

Since the decision in *Brown v. Maryland*, over one hundred and thirty years ago, there has not been a single holding by this Court which would call for sustaining the Ohio Court's construction of the imports clause, and it is proved from the relative paucity of litigation during those years in both this Court and state courts that the rule of Marshall, Taney and Stone is a fair and practical approach, consistent with the intent and purpose of the framers of the Constitution.

B. The Rule Established in Brown v. Maryland, Supra, Has Also Found Expression in Various State Courts' Decisions and Derives Support from Them.

The rule that imported bulk fungibles stored in the same form as imported do not lose the tax immunity granted by Article I, Section 10, Clause 2, until removed from storage and subjected to the specific use for which they were imported, has proved itself to be a practical and workable rule.

The case of *Mexican Petroleum Corp. v. Louisiana Tax Commission*, 173 La. 604, 138 So. 117, (1931), involved crude oil imported in bulk from Mexico and Venezuela in tank ships. When the oil reached the port of entry, it was pumped from the ships through pipes into land tanks

where it was stored until needed. At different times part of the oil was withdrawn for use from the tank where stored and when new shipments of oil identical in grade to that originally stored in a particular tank, arrived, it was added to that tank. Various grades were not commingled. The Court ruled that since there was no commingling or processing of the oil while in the storage tanks, and since the oil retained the same form as when imported, it did not cease to be an import. We quote the opinion at pages 614 and 615:

"It is obvious under the authorities cited, and especially under Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095, that because the oil came to a state of rest at Destrehan to be there refined, it did not lose its character as an import. A more important question concerns the manner of importation. Our appreciation of Brown v. Maryland, and the authorities cited, resting upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the manner of importation, it suffices that the import, to retain its character as such, remain in the original form in which imported. Some property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages. It was not the intention, however, to exclude such property from the immunities of imports. Of this nature is crude oil. The only practical way of importing it is in bulk. To import it in barrels would make the oil too costly to be used in general commerce, whether for heating purposes, or for the manufacture of important articles of gasoline, kerosene, asphalt, or other products.

"* * * * * * * * * *

"The circumstances of pumping the oil into tanks, in unloading it, containing each about 1,000 barrels of oil of the kind and quality pumped into it—a circumstance which could not be practically avoided in the ordinary course of things—did not cause the oil to lose its character as an import. There was no change

here in the oil through a process of mixing, for the oil put in each tank was identical in kind and grade with that already in it. Besides, the record justifies the conclusion that the oil already in the tanks was oil imported by plaintiff, and still retained its character as an import, and hence there was no mixing of the oil with oil that had become incorporated into the general mass of the property of the country."

A second case is *City of Galveston v. Mexican Petroleum Corp.*, 15 F. 2d 208 (District Court, S. D. Texas (1926)), wherein it was held that oil imported in bulk to fill sales contracts, and stored in tanks at Galveston after being removed from the tankers, was still an import, stored in the same form as imported, and therefore protected by the Federal Constitution.

A further authority dealing with the import character of bulk fungibles is *Mexican Petroleum Corporation v. The Borough of Roosevelt,* (1919) decided by the Supreme Court of New Jersey (unreported, see Appendix II). The taxpayer imported oil in bulk and stored it in large tanks prior to use. The Court held that because nothing had yet been done by the importer to change the character of the oil in the tanks, it was immune from tax while so stored.

Another case in which a court considered the problem of whether raw materials imported in bulk are taxable while stored in the original form is *Re: Taxes Pacific Guano & Fertilizer Co.,* 32 Hawaii 431, (1932). The taxpayer there imported phosphate rock in bulk to be used for manufacturing fertilizer. The rock was stored at several of the taxpayer's warehouses in the territory of Hawaii. On page 441, the Court makes the following observation:

"The phosphate rock was brought in ships in bulk. It could not have been stored in original packages, for it did not come in any packages whatever. It could

be an undue stretch of language to say that the ships were the original packages. The test as to 'original packages' does not apply in such a case. The phosphate rock, within the decision in the Maryland case, was in the warehouse of this taxpayer in the 'original form' in which it was imported, that is, it was in bulk; it was being kept in the warehouses in bins separate from the general mass of property in this Territory."

See also *Washington Chocolate Co. v. King Co.*, 21 Wash. 2d 630, 152 P. 2d 981, *cert. denied*, 324 U. S. 880 (1945);

In direct conflict with the rule of the above cases is *Mexican Petroleum Corporation v. City of South Portland*, 121 Me. 128, 155 Atl. 900 (1922). That case held that the ships used to import oil in bulk were the "packages" and that they were broken when the oil was unloaded and pumped into onshore storage tanks. Even though this decision pre-dated all but one of the cases cited herein, none of them followed it, and it was expressly disapproved in *Mexican Petroleum Corporation v. Louisiana Tax Commissioner, supra.*

The Attorneys General of the following states have cited the *Hooven & Allison* case as authority for opinions published since 1945: Alabama, California, Maryland, Minnesota, Nebraska, Ohio, Oregon and Wisconsin.[1] Only two of those opinions sought to qualify the *Hooven* case in any respect, those of the Attorney General of Ohio and the

[1] See 76 Report of Atty. Gen. of Alabama 72-77 (Opinion dated August 30, 1954); 24 Ops. Atty. Gen. 287 (Calif. 1954); Tht Daily Record (of Baltmore, Maryland) of January 22, 1958 (Opinion dated December 12, 1954); 2 CCH Maryland Tax Reporter para. 200-152 (December 19, 1956); The Daily Record (of Baltimore, Maryland) of October 18, 1955 (Opinion dated August 8, 1955); 30 Ops. Atty. Gen. 220 (Md. 1954); Report of Atty. Gen. to the Governor, State of Minnesota, p. 333 (Opinion No. 167 dated May 24, 1954); Report of the Atty. Gen. of the State of Nebraska, p. 420 (Opinion dated May 2, 1945); Opinions of the Atty. Gen. of Ohio (Opinion No. 760, February 26, 1946); 1 CCH Oregon Tax Cases para. 200-330 and 200-676 (Summaries of Opinions of Atty. Gen. Ore. of November 2, 1955, October 5, 1955, March 20, 1957); 30 Ops. Atty. Gen. 563 (Wis. November 10, 1959).

Attorney General of Wisconsin. It is not surprising, therefore, to find this case from Ohio consolidated for argument with a case from Wisconsin.

The precise question involved in this case, was recently reviewed by the Attorney General of Maryland, who held that "so long as (iron) ores from different foreign sources are kept in separate stockpiles in the same form and condition in which received, they would, in our opinion, retain their original characteristics as imports." 2 *CCH Maryland Tax Reporter* paragraph 200-152 (Opinion dated December 19, 1956).

The Maryland Attorney General had previously considered the same problem with respect to ilmenite, a black sand-like ore imported from India, and expressed the opinion that "the fact that an imported material may be of such character as not to be susceptible of packaging does not destroy the immunity (afforded to it by the Constitution) so long as it is not sold or appropriated to the use for which it is designated by the importer." 30 *Ops. Atty. Gen.* 220 (1945). In a subsequent opinion dated December 12, 1957, and reported in The Daily Record (of Baltimore, Maryland) of January 22, 1958, the Attorney General confirmed his earlier opinions and held that imported olive oil held in storage prior to withdrawal for blending with other oils was not subject to state taxation.

The obvious purpose of the original package or form doctrine is to mark out a line which will distinguish the juncture at which imported goods become a part of the general mass of property within a state and therefore taxable. Decisions of this Court and decisions of the various states have established the points of the line to be (1) when the import is sold by the importer, or (2) when the original imported package is broken, or (3) when the import is actually used to meet the purpose for which it was

imported. Until one or the other of those points is crossed, the import remains within the scope and the immunity allowed by the Federal Constitution.

In what has become a classic dissent, Justice Holmes said in *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 41 (1928):

> "When a legal distinction is determined as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it, the line or point seems arbitrary. It might as well or might nearly as well be a little more to the one side or the other, but when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

So also must it be with the principles of constitutional law evolved through the repeated decisions of the courts. That the line of immunity for imports might have been drawn or developed a little differently, is not nearly so important as the fact that it has been drawn and that as drawn, it has been applied consistently ever since its beginning. Very few rules have withstood so severe a test of time without having been surrounded and modified by the imposition of conditions and exceptions. State courts and state tax administrators are zealous in guarding against tax exemptions and quick to pick up and oppose those which cannot be justified or which are vague and uncertain. That this has not happened to the present rule for imports is an argument in itself for the validity of the rule.

C. The Decision of the Supreme Court of Ohio Makes An Unwarranted Distinction Between Bulk Fungible and Packaged Imports.

The following statement appears in the opinion of The Ohio Board Tax Appeals (R. 14):

> "The exceptional men who produced the constitution, and the particular provision drawn in question could readily visualize, or had already experienced, that certain commodities would be imported in bulk which were not susceptible of packaging. Hence, they generally provided that no state should lay imposts or duties on imports until that properly had lost its import character. They did not limit the provision's applicability to packaged imports."

From a cursory reading it might seem that the Ohio Supreme Court had adhered to the Constitution and the decision of this Court in *Brown v. Maryland, supra* by expounding a rule, merely limiting the tax exemption for fungible imports. However, in practical context the two exceptions constituting the Ohio Court's pronouncement will have the effect of laying imported fungibles open to state taxation in nearly every situation. The first exception in the Ohio Court's rule is that the removal of a particle of iron ore or any part of an imported shipment of fungibles, subjects the whole shipment immediately to taxation. The second exception is that the mere storing together of two shipments of the same imported commodity is sufficient to destroy the import character of both. Within these bounds, bulk imports will be subject to state taxation almost immediately after their importation even though not yet used or sold.

In *Brown v. Maryland, Low v. Austin,* and *Hooven & Allison Co. v. Evatt,* packages were continuously being taken out for sale or use, and undoubtedly new shipments

of packages were being added to the old, but at no place did this Court indicate that the taking of a package from a shipment, of the adding of a new package to a shipment, influenced the taxability of the whole shipment. To the contrary, without exception, the cases hold that an imported package until broken or until devoted to the use for which it was imported, is within the protection of the Federal Constitution and under the jurisdiction of the Federal Government.

In fact, *Hooven & Allison* stressed the point that goods imported for use in manufacturing had to be extended the same immunity and equality of treatment as those imported for sale, and by like token, fungible imports must be on a par with packaged imports. The Ohio Court in the instant case advanced no reason why, if given two shipments of imports, one in bulk and the other in packages, the former should come under the control of states sooner than the latter. Decisions of this Court have never required importers of packaged goods to keep each entire shipment intact and unused or separate from other shipments, and to subject importers of bulk fungibles to a different, more rigorous standard is a distinction without any real or justifiable difference.

Furthermore the discriminatory treatment of bulk imports that would result from the Ohio Court's holding strikes at one of the basic reasons behind the original package or form doctrine. Chief Justice Taney in the *License Cases, supra,* pointed out that the purpose of the doctrine was to protect interior states from the unfair tax advantage that might accrue to seaboard states, see too Justice Black's dissent in *Hooven & Allison Co. v. Evatt, supra.* If allowed to stand, the decision of the Ohio Court and the distinction it imposes between bulk and packaged imports, would revive the mischief that the import clause was de-

signed to end, for under the Ohio Court's decision, ore shipments, and shipments of bulk fungibles in general, stored on docks or elsewhere in the state of the port of entry would become taxable by the state the moment two shipments of the same ore were piled on one another, or any part thereof was removed by the importer for ultimate use sometime in the future.

No matter how viewed the Ohio Court's decision is contrary to the imports clause of the Constitution as construed by the decisions of this Court. In reality all that the Ohio Court is doing is placing upon this Court the burden of hearing a reargument of *Hooven and Allison, supra.*

D. The Tax Consequences for Imported Merchandise Are Determined as of Tax Day.

For all taxes, there is a day certain on which the taxable status of property is fixed, 3 *Cooley, Taxation,* 4th Ed. Section 1062, pages 2138-2145. That day for the Ohio Personal Property Tax is January 1, of each year [2], excepting for inventories of raw materials such as the imported ores here involved, and as to them their status is determined on the last business day at the end of each month during the preceding calendar year.[3] If on those days the imported ores lie in storage in the same form imported, and not yet used in manufacturing, or removed to the point of use, then they should be exempt from tax under the doctrine of *Brown v. Maryland, supra.*

This in effect was the holding of *Hooven & Allison Co. v. Evatt, supra,* that imports are taxable depending upon how they actually stand on the day or days when the tax

[2] Section 5711.03, Revised Code of Ohio, Title 57, Page's Ohio Revised Code, page 103; Volume 6 Baldwin's Revised Code and Service, Title 57, page 53.

[3] Section 5711.16, Revised Code of Ohio, Title 57, Page's Ohio Revised Code, page 113; Volume 6 Baldwin's Revised Code and Service, Title 57, page 58.

enures, and not on what may eventually be done with them later. Other decisions of this Court have accepted that as the valid, indeed the only workable, criterion of taxability.

It was held in *People v. Commissioners,* 104 U. S. 466 (1881), that capital in the form of cash owned by the taxpayer on tax day was taxable by the state even though subsequently it might be invested in the purchase of products which were exports.

In *Leisy v. Hardin,* 135 U. S. 100, (1889), the Court stated that the distinction between a proper and improper tax on imports did not turn upon when the act of importation occurred, nor upon when the property might be used, but rather upon the determinable fact that when the tax was imposed the property had at that time already been acted upon by the importer so as to change its form from that which it had at the time of import.

In the earlier case of *Coe v. Errol,* 116 U. S. 517, (1886), this Court held that the taxpayer's intention to introduce fungibles into the stream of interstate commerce did not thereby exempt them from local taxation. The actual fact of introduction rather the owner's intent as to their future disposition was deemed to be the controlling agent.

And see also, *Washington Chocolate Co. v. King County,* 21 Wash., 2d 630, 152 p. 2d 981, *cert. denied,* 324 U. S. 880 (1945).

Appellant has claimed exemption in this case only for those ores which were stored in their original form away from the area of manufacturing on tax valuing day. The Ohio Supreme Court, on the other hand, by device of the fiction that the removal of part of a shipment for use removed the whole shipment, and that the storing of two shipments together removed both for use, substituted a test which depends upon the state of the importer's mind rather than the actual state of the import on tax valuing day.

It is conceded that eventually all of the ores in storage will be used, but until they are used the importer has not acted upon them. The import status of appellant's shipments of ores terminates only as to that part which on tax day has been put to use, and just as the use of one package from a shipment, or the opening of one package out of a shipment for the purpose of using it, does not affect the other packages stored in the same place or received in the same shipment, so neither does the removal by the appellant of the equivalent of a package or packages for use affect the ore which remains undisturbed in storage on tax day. We have not yet arrived at the time when an importer can stand back and think raw materials into a changed form, any more than the appellant can think iron ores into iron or steel products.

E. The Purpose of the Imports Clause was to Confer the Control of Imports Exclusively Upon the Federal Government as Distinguished from the Various States and Territories.

The control of imports must reside in but one sovereign, the Federal Government. It was held in *Brown v. Maryland, supra*, that the right to import merchandise carried with it the right to store the merchandise in the same form or package as that in which it was imported. Presumably the Court felt that the act of importing for sale and the act of storing the import were so closely knit as to be practically indistinguishable, and consequently a tax on the right to store was just as much a tax on the right to import. It is equally true that the right to import raw materials includes the right to store them pending their use, for what else could be done with them? Were the State of Ohio permitted to tax this appellant on its im-

ports while they are yet in storage, then so could every other state and territory tax imports similarly held in storage, and we would point out in this regard that the power to tax carries with it the power to impose a confiscatory tax, *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934); *McCray v. United States*, 195 U. S. 27 (1904), as well as the power to regulate by tax, the *Case of The State Freight Tax*, 15 Wall. 232 (1872). Instead, therefore, of one sovereign setting and administering the policies governing the importation of goods the area would be opened to the control of many sovereigns. It is of a paramount importance to prevent control by more than one sovereign, for there are many sections of the country where strong hostility exists to low tariffs, foreign trade, foreign aid; or in fact anything other than that local in nature. If these sections were given the power to tax imports, they would most certainly use that power in an effort to prevent those imports certain selfish business interests do not favor, something which would be injurious to the overall national economy.

Unlike the commerce clause which contains no prohibition against state taxation or regulation of interstate commerce, the imports clause expressly enjoins that:

> "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except, what may be absolutely necessary for executing its inspection Laws * * *"

This Court recognized that the Import Clause was intended to confer upon the National Government the exclusive power to determine when and to what extent imports should be taxed in *Hooven & Allison Co. v. Evatt, supra*, at page 656 of the opinion.

If Congress had wanted to, it could have permitted the states to impose taxes upon imports. The same clause of

the Constitution which protects imports from state tax also grants the Congress the power to permit taxation. But no such legislation has been enacted, which is evidence of a Congressional intent that imports shall not be taxed. *Leisy v. Hardin*, 135 U. S. 100 (1890).

It is for the Congress to decide in the first instance where and to what extent local taxation or regulation of imports is to be permitted, and in the absence of permissive federal legislation on the subject, the states are on excluded from encroaching upon foreign commerce. It must be concluded that this is an area where the interests of the nation as a whole can be served only by the Federal sovereign.

D. Conclusion.

For the reasons above stated, the appellant respectfully requests that the decision of the Supreme Court of Ohio be reversed as contrary to Article I, Clause 2, Section 10 of the Constitution of the United States, and the decisions of this Court.

II

EQUAL PROTECTION

A. Former Section 5701.08, Revised Code of Ohio, Denies the Appellant the Equal Protection of the Laws for the Reason That It Imposes a Tax upon the Storage Merchandise of Domestic Corporations Held for Storage Only, While at the Same Time Excepting from Taxation the Storage Merchandise of Non-residents When Similarly Held for Storage Only.

Former Section 5701.08, Revised Code, provided as follows:

> "As used in Title LVII of the Revised Code:
>
> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; *but merchandise or agricultural products belonging to a nonresident of this state is not used in business in state if held in a storage warehouse for storage only.* Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere."

The section was amended effective September 30, 1955, and the italicized clause was changed so as to read:

> "* * * and merchandise and agricultural products shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside of this state are not used in business in this state."

It will be noted that the 1955 amendment removed the phrase "belonging to a nonresident of this state", and therefore the section as it presently reads treats both residents and nonresidents alike. Before the amendment, however, the "storage only" provision applied exclusively to nonresidents.

The term "storage only" has been construed by the Ohio Supreme Court to mean merchandise which was held in storage by the owner, and not used or processed during storage.

In *General Cigar Co., Inc. v. Peck,* 159 Ohio St. 152, 111 N.E. 2d 265 (1953) the Court held that stored and unprocessed tobacco was entitled to tax exception because it was owned by a nonresident corporation.

> "1. The exception in the definition of 'used in business', contained in Section 5325-1, General Code, that 'merchandise or agricultural products belonging to a nonresident of this state if held in a storage warehouse therein for storage only,' is not applicable to products upon which essential steps in manufacturing or processing are carried on during the period of storage, *but is applicable where nothing is done in connection with such storage except what is necessary for the preservation of the stored merchandise or agricultural products.*" (Emphasis added)

In the later case of *B. F. Goodrich v. Peck;* 161 Ohio St., 202, 118 N.E. 2d 525 (1954), the Ohio Court followed the above holding and applied it to a manufacturer (the company was also engaged in retailing) which held goods and raw materials in a central warehouse for sale and use in manufacturing in this state. Paragraphs 1 and 2 of the Syllabus read:

> "1. In the absence of the expression of a contrary legislative intention, a corporation incorporated under the laws of a foreign state will generally be included by the use in a statute of the word 'nonresident'.

"2. Property may be held 'for storage only' even though its owner intends at some subsequent time to sell it or to use it as manufacturing material. (*General Cigar Co., Inc. v. Peck, Tax Commr.*, 159 Ohio St., 152, followed)"

Subsequently the Court clarified the above holdings in *Grinnell Corp. et al v. Bowers*, 167 Ohio St., 267, 147 N.E. 2d 657 (1958):

"Property cannot be considered as 'held in a storage warehouse for storage only' within the meaning of Section 5701.08, Revised Code, as it read prior to September, 1955, in those instances where it is located at the place where it is to be used in manufacturing or at the place where it was manufactured into a product or at the place from which it is in effect to be delivered by a taxpayer directly to a customer."

Appellant waives its claim as to those inventories of raw materials and finished pipe which are stored at the plant where they are to be used or were used in manufacturing (R., 52). However, the domestic iron ore stored on the Lake Erie Public Docks at Ashtabula, Ashtabula County, and Bedford, Cuyahoga County, for later shipment by rail to Youngstown, is entitled to exception from taxation under the holdings of the above cases. The only feature present in this case that prevents this appellant from receiving the equal benefit of the exception provided for nonresidents is the fact that it is a domestic corporation, having filed its incorporation papers in Ohio rather than in some other state. The discrimination thus created deprives domestic corporations, and residents, of equal protection of the laws.

The equal protection clause of the Constitution requires that all persons, including corporations, *Turnpike Road Co. v. Stanford*, 164 U. S., 578, (1896), who are similarly situated shall be treated alike. The principle was stated

by this Court in *Ohio Oil Co. v. Conway*, 281 U. S., 146, (1930) as follows on pages 159 and 160:

> "The applicable principles are familiar. The states have wide discretion in the imposition of taxes * * * It may grant exemptions * * * In levying such taxes the state is not required to resort to close distinctions or to maintain a precise scientific uniformity with reference to composition use or value * * *
>
> With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"

Unless there is a valid and substantial difference between two taxpayers and unless that difference bears an immediate relationship to the thing taxed and the nature of the tax, the Constitution prohibits any discrimination between them.

The Ohio levy in question is an *ad valorem* tax against all personal property located in the state and used in business in Ohio. The tax falls directly upon the property itself. Obviously the owner's residence, or the state in which a corporation may happen to have filed its original incorporation papers, is a characteristic of ownership, and is not representative of the amount or kind of personal property used by a company for its business in this state. The rule is broadly stated in 1 *Cooley, Taxation*, page 717:

> "Property can be segregated into classes only by reason of difference in it which afford a ground for different treatment in reference to taxation. The reasons for classification must be such as naturally inhere in the subject matter. Differences in the use of

property, may be the basis of classification * * * *So property must be classified by characteristics possessed by it and not by the incidents of ownership.*" (Emphasis added)

And that principle was recognized by this Court in *McHenry v. Alford,* 168 U. S., 651 (1898) on page 666 of the opinion where it was observed in passing that "we agree that property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and taxed by a different rule simply because it belongs to different owners * * *". See also, *Gamble-Robinson Fruit Company v. Moreson,* 53 N.D., 28, 204 N. W., 261 (1925), *Little, et al v. Smith, et al* 124 Kan. 237, 257 P. 959 (1927).

The Ohio personal property tax came before this Court for review in *Wheeling Steel Corporation v. Glander,* 337 U. S., 562 (1949) and the same kind of discrimination was involved there as is present in this case. The Ohio Tax Commissioner attempted to tax accounts receivable of foreign corporation, and except from taxation those of domestics. As in the case at hand the difference between taxation and exception was one simply of residence. At page 572 of its opinion, the Court held the following:

"If on the taxing date one of these petitioners (a foreign corporation) and an Ohio competitor each owns an account receivable of the same amount from the same out-of-state customer for the same kind of commodity, both shipped from a manufacturing plant in Ohio and both sold out of Ohio by an agent having an office out of the State, appellant's account receivable would be subject to Ohio's ad valorem tax and the one held by the competing domestic corporation would not."

"*It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner.*" (Emphasis added)

This holding applies with the same force to the present case, for the appellant here is discriminated against in exactly the same way and for exactly the same reason. The distinction made between merchandise stored by a foreign corporation and that stored by a domestic turns exclusively upon the taxpayer's residence and therefore discriminates against the appellant as much as did the tax which this Court struck down in the *Wheeling Steel* case.

In these times of broad and widespread business activity the fact that a company filed its papers of incorporation in one state does not mean that it cannot or ordinarily will not conduct business in some other state. In the recent case of *Grinnell Corp. et al v. Bowers,* 167 Ohio St., 267, 147 N. E. 2d 657, (1958) ten corporation taxpayers, all of them nonresidents, sought the benefit of the storage only exception for their business property, and likewise the taxpayers in *General Cigar Co., Inc. v. Peck, supra,* and *B. F. Goodrich Co. v. Peck, supra,* were nonresident corporations. Each of them conduct extensive business operations in this state, in most instances of greater scope than many domestic corporations.

It is apparent that from an examination of a corporation's business activities or its business property, without more information, it would be impossible to know whether it was incorporated in Ohio or in another state. And it is equally apparent that if a company were incorporated in some other state that would have little or no effect on its business activities in Ohio or on the property which it

Since the tax in question is an *ad valorem* tax against personal property, an assessment against this appellant merely because of its residence, which is a characteristic of it, the taxpayer, and not of the property being taxed, will result in an arbitrary discrimination without any relationship to the subject of the tax, which is property used in business.

B. Former Section 5701.08, Revised Code of Ohio, Denies the Appellant the Equal Protection of the Laws for the Reason that It Discriminates against Taxpayers Engaged in the Same Business and Holding the Same Kind of Property for Storage Only.

In *B. F. Goodrich Co. v. Peck*, 161 Ohio St., 202, 118 N.E. 2d 525 (1954) the Court held that the taxpayer was entitled to exception from the tax as to tire cord, a raw material which it used in manufacturing and which was stored at the taxpayer's warehouse in Ohio for subsequent shipment to its plants in Akron, Ohio. The Court reasoned that so long as the cord was in storage and was not used in any manufacturing or processing operation, it was held for storage only. In answer to the Tax Commissioner's contention that the cord could not be so considered because the taxpayer intended at some later date to remove it and put it to use in manufacturing, the Court stated on page 205 of its opinion:

> "It may be observed that property is never placed in storage by its owner unless the owner intends to use it in some way later on. Therefore the statutory provision involved would be meaningless if given a construction such as contended for by appellant. Likewise, we believe the decision of this court in *General Cigar Co., Inc. v. Peck, Tax Commr.*, 159 Ohio St., 152, 111 N.E. (2d), 265, necessarily disposes of any such contention."

Both the taxpayer in *Goodrich* and the appellant in this case are manufacturers with plants in Ohio; both stored raw materials at a central point in this state; and both used those raw materials for manufacturing purposes in this state. Despite these similarities, the tire cord stored by the taxpayer in *Goodrich* was excepted from the Ohio personal

property tax, whereas the iron ore stored by this appellant has been taxed. The resultant discrimination does not rest on any difference between the two taxpayers' business operations, or between the kinds or amounts of property stored by them, or their methods of storage, but soley on the fact that the B. F. Goodrich Company is a nonresident and this appellant is a resident.

In some instances this might be sufficient for a classification of taxpayers, but not here where the tax is levied against property and is based upon the business use of that property. In order to be valid, any classification of taxpayers for purposes of the Ohio tax must be a classification by reason either of some characteristic of the storage property, or some difference in the business use to which the property is put. Residence is neither.

A recent decision of this Court leaves little doubt but that the tax in this case is invalid. The issue in *Morey v. Doud*, 354 U. S. 457, (1957) turned upon a state statute requiring firms in the business of selling or issuing money orders to secure a license and to submit to state regulation, while at the same time excepting the American Express Company from its provisions.

The Court concluded that the firms were denied equal protection of the laws, saying on page 465:

> "Of course, distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. This is so even where the discrimination is by name. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences.'"

The basic unfairness of the Ohio Court's decision, and of the Ohio statute, is amply demonstrated by an illustration

which is typical of what happened to Ohio industries because of the discrimination between residents and nonresidents. Two companies engaged in the same business activity, such as retailing or manufacturing, and therefore competing with each other for the same market in the same local area, were treated for purposes of the tax in a substantially different way, not because of any difference in their businesses or in the kinds of property which they held in storage, but merely because the one was a resident and the other was a nonresident. The wares and raw materials of the resident, while in storage, were taxed to the fullest extent permitted by the statute, while those of the nonresident were excepted from any tax whatever. Inequality is the theme of such a system of taxation.

C. The Entire Exception Cannot Be Removed from the Statute.

On page 120 of its decision in *Allied Stores of Ohio, Inc. v. Bowers*, 166 Ohio St., 116, 140 N.E. 2d 411 (1957) (the holding of which controls for this case) the Ohio Court implied that the entire exception for storage only merchandise should be removed from the statute. This dictum is directly opposed to the position taken by the Ohio Court in *B. F. Goodrich Co. v. Peck*, 161 Ohio St., 202, 118 N.E. 2d 525 (1954). There a foreign corporation claimed the exception for its storage merchandise, and the Tax Commissioner opposed the claim with the argument that the exception was discriminatory as to residents, and therefore was unconstitutional. The issue was thus drawn, and if the exception were to be removed, the opportunity was presented by that case. Yet the Ohio Court refused to delete the exception or to modify it in any way. We quote the opinion at page 210:

> "There is much force to the argument of the Tax Commissioner that the decision of the Board of Tax

Appeals (granting the exception) will discriminate against residents of Ohio. However, such an argument should be addressed to the General Assembly and not to this Court. This Court is not responsible for the statutory language or for any ambiguities therein." (Parenthical matter added.)

In the present case, the appellant has not challenged the statutory right of exception from tax which has been granted to nonresident corporations. Their rights are not in issue in this case, and are not before this Court. What appellant does claim is equal protection with non-residents by being considered for tax exception on the same basis.

The Ohio Court denied this request for equal treatment, on the ground that the legislature did not intend to except the storage merchandise of residents, and that the Court could not act contrary to the legislature's expressed intent. In other words, the Ohio legislature intended to discriminate against residents, and therefore the discrimination must be sustained, even though it means a denial of equal protection. To state the proposition is to refute it. No decision of this Court supports the idea that a state legislature can extend a benefit to one part of a class, and then rely upon its intention to discriminate as a justification for denying the same benefit to the remainder of the class. The Federal Constitution requires equal protection within a class, irrespective of a legislative intent to deny that protection.

Since nonresidents are excepted from tax on their property held for storage only, it follows that residents must be treated similarly and accorded equal tax treatment.

The Ohio Court's approach is incorrect for the further reason that this Court has never removed an entire provision from the statute unless it were first shown that the

state legislature considered the provision to be dispensible and would acquiesce in its removal, *Frost v. Corporation Comission of Oklahoma*, 278 U. S., 515 (1929); *Reitz v. Mealey, Commr.*, 314 U.S., 33 (1941).

In 1955, after the decisions in *General Cigar* and *Goodrich, supra*, the storage only exception was reconsidered and amended by the Ohio Legislature. In place of the language,

> "* * * but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only."

the following was substituted,

> "* * * merchandise or agricultural products shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside this state are not used in business in this state."

The opportunity was then ripe in 1955 for the Ohio Legislature to remove the entire exception for property held in storage. That was not done. The exception was retained, although modified so as to apply to merchandise shipped from outside of Ohio and stored in Ohio for shipment outside the state. The only language which the Legislature did remove was the phrase, "belonging to a nonresident of this state."

It is proved by this action that the Legislature would not concur in the omission of the entire exception and that if any language is to be deleted, it is the discriminatory phrase "belonging to a nonresident of this state." Without that phrase, there would be complete tax equality between residents and nonresidents.

Moreover, the tax exception granted nonresident corporations for merchandise held in storage only is an integral part of former Section 5701.08, Revised Code of Ohio, and therefore cannot stricken from the statute. Section 5701.08

was originally passed by the 1931 session of the Ohio General Assembly. In the very next session, 1933, the whole section was re-enacted with the storage exception as part of it. Thereafter, for some twenty-two years, up until its amendment in 1955, taxpayers relied upon it in making their annual tax returns, and tax officials administered it regularly as a part of the statute.

To remove the whole exception now would subject taxpayers to liability and assessments for taxes dating back to 1933. This naturally would have the effect of a judicial tax levy to the same extent as if the Court were to hold that certain persons should pay a tax which had not been levied on them by the Legislature, and which they were not required to pay under any existing legislative enactment. It is axiomatic that Courts do not sit as superlegislatures empowered to levy taxes on property which the state legislature has not subjected to taxation, *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 565 (1902).

Appellant concludes that the entire exception cannot be removed because it is an integral part of the statute, having been in the statute and administered as a part of it for 22 years; that it cannot be removed for the further reason that when the Ohio Legislature amended the section in 1955, it did not remove the whole exception but only the discriminatory words which had limited it to nonresidents; and the exception cannot be removed for the additional reason that its removal would turn the Court into a taxing body with the result that the Court, not the Legislature, would be levying the tax. If any words can be deleted, they are those contained in the phrase "belonging to a nonresident of this state" because those words create the inequality, and because the Ohio Legislature itself removed them in the 1955 amendment.

D. Section 5701.08, Revised Code of Ohio, is Unconstitutional to the Extent that It Results in the Imposition of a Tax Upon Personal Property Held by Residents for Storage Only.

Former Section 5701.08, Revised Code of Ohio, defined personal property "used in business" as that which is "stored or kept on hand as material, parts, products, or merchandise." To the extent that this definition includes property held by a resident for storage only, it is unconstitutional.

The error in the Ohio Court's reasoning springs from the mistaken belief that in order to implement the equal protection clause, the statutory exception for nonresidents would have to be severed from the body of the statute. This, of course, is not so. The fault of the statute is the unequal tax burden that it casts upon residents. It is the levy and assessment of the tax which the State has asserted against this appellant, and other residents, that creates the inequality, and which should be voided by this Court as unconstitutional. By thus cutting the tax back, and freeing residents of the unequal burden which the tax imposes upon them, the requirements of equal protection are fully satisfied.

Insofar therefore, as Section 5701.08, Revised Code of Ohio, operates to tax all of the appellant's property held in storage, including that held for storage only, the section is unconstitutional and void.

CONCLUSION.

Appellant submits therefore, that the decision of the Court should be reversed as denying resident corporations equal protection of the laws, and final judgment entered for the appellant.

Respectfully submitted,

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APPENDIX I

Section 5709.01—All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state, whether or not used in business, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property.

Section 5711.01—As used in sections 5711.01 to 5711.41, inclusive, of the Revised Code:

(A) "Taxable property" includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code, and also the amount of value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable

property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code, nor surrender values under policies of insurance. * * *

Section 5711.03—Except as provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, all taxable property shall be listed as to ownership or control, valuation, and taxing districts as of the beginning of the first day of January, annually, except that deposits not taxed at the source pursuant to section 5725.05 of the Revised Code. The subsequent transfer of any taxable property shall not authorize any taxpayer to omit the same from his return nor the assessor to fail to assess the same in the manner required, although such return or assessment is not made until after such transfer. When a person becomes a taxpayer between the first day of January and the first day of July, in any year, he shall list all his taxable property as to ownership and taxing districts as of the date when he becomes such taxpayer, and as to valuation as of the next preceding first day of January, unless he shows to the assessor, under oath, and by producing a copy of the return or assessment, that the same property has been listed or assessed for taxation in that year in this or another state or country, or that such property has been received by him in exchange for property so assessed; but a person engaging in business between the first day of January and the first day of July in any year shall list the probable average amount of personal property intended to be used in business by him until the first day of January next thereafter.

Section 5701.08—As used in Title LVII of the Revised Code:

(A) Personal property is "used" within the meaning of "used in business" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only. Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are "used" when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

(B) "Business" includes all enterprises conducted for gain, profit, or income and extends to personal service occupations.

APPENDIX II

New Jersey Supreme Court.

Mexican Petroleum Corporation, Prosecutor, v. The Borough of Roosevelt, et al., Respondents.

Argued June Term 1919 before Justices Bergen, and Kalisch.

Per Curiam.

The borough of Roosevelt assessed as the property of the prosecutor, a tug and three barges at a valuation of $130,000 and a quantity of oil in storage at $56,409.96. The prosecutor appealed to the Middlesex county board of taxation which affirmed the assessment, and thereupon this

writ was allowed. It is admitted that the tug and barges were improperly assessed, and as to them the assessment should be set aside. The only question in dispute is that relating to the oil. The facts are these. The prosecutor imports the oil from Mexico and then stores it in large retainers which are located in the borough of Roosevelt. After this is done the prosecutor draws the oil and sells it to different persons. The prosecutor's contention is that this oil being an importation, is not liable to taxation, and the only answer to this is that when the oil is pumped from the vessels in which it is imported to these tanks it then becomes mingled with the mass of other property in this state and therefore is under well settled principles, subject to taxation. It is conceded that if this oil was imported in barrels or other packages, it would not be taxable so long as the packages remained unbroken, or disposed of in such packages. We are unable to see how it can be said that the importation has lost its character simply because it is pumped into retaining tanks in this state, for so long as it remains there it is not mingled with the mass of other property. If this be not so, then the character of the retainer would permit the imposition of taxes in violation of the Federal Constitution.

The cases relating to this subject plainly indicate that something must be done by the importer to change the character of the importation before *it* becomes subject to taxation, and the fundamental ground upon which taxation is permitted, is that the property has become part of the mass of other property of the state, and this cannot be said occurs when a boat load of oil in bulk is moved from the ship to the warehouse for the purpose of subsequently selling it. The assessment will be set aside with costs.

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No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

On Appeal from the Supreme Court of Ohio

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

REPLY BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 9

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

REPLY BRIEF FOR APPELLANT

I

PACKAGED AND BULK FUNGIBLES MUST BE ACCORDED THE SAME TAX IMMUNITY.

The test established in *Brown v. Maryland,* 12 Wheat., 419, (1827), and in every case down to the most recent, *Hooven & Allison v. Evatt,* 324 U. S. 652 (1945), is both clear and certain in its application, and it makes no provision for the exceptions which the tax commissioner and the Ohio Court seek to assert. The test protects imports stored in the same form as imported, whether in packages or in bulk, so long as they are in storage and not acted upon for the purpose of their importation, i. e. either sale or manufacture.

The tax commissioner's argument contrary to the above rule merely follows the lead of the Ohio Supreme Court which held that the removal of a part of the imports shipment for eventual use, or the storing of one identical imports shipment with another destroys the shipment's immunity. Where shipments of goods are imported in packages, the decisions of this Court have never held or implied that the remaining packages of a shipment lose their immunity from local taxation simply because one or more packages are removed from the original shipment or shipments and used or sold, or because different shipments of packages are stored with each other, and there is no fair or logical basis for applying a different rule to bulk fungibles. The Constitution by its terms protects all imports, and it protects them to the same extent, and it follows, therefore, that bulk fungibles cannot, in any proper construction of those terms, lose their constitutional immunity from tax any sooner than do packaged goods.

In other import cases reviewed by this Court, various different shipments were stored in the same place and with each other. That certainly was true in *Hooven & Allison, supra.* But in no instance has the Court permitted a tax while the import was still in storage and not acted upon for its intended purpose, either sale or manufacture.

The commissioner also contends that imports are taxable if they are stored at the place of use, a test which has never had acceptance from this or any other Court. In any event, such a situation is not present in this case, since the stipulation shows (R. 34, 35, 36, 37 and 38) that the imported ores here in issue are not stored at the place of use, and therefore the commissioner's argument on this point is without meaning.

The commissioner further contends that fungibles imported for use in manufacturing must "bear their fair

share of the tax". As pointed out above, however, the Ohio Court's decision would subject fungibles to a greater tax burden than that borne by packaged goods imported for sale. If the commissioner had really wanted tax equality he would have abided by the decision of the Ohio Board of Tax Appeals, which did treat fungibles and packaged imports equally.

II

THE CASES CITED IN THE TAX COMMISSIONER'S BRIEF ARE NOT APPLICABLE.

Several cases are cited by the commissioner in the last few pages of his brief, the first of which is *May v. New Orleans,* 178 U. S. 496 (1900). That case does not hold that each entire shipment of fungibles is a package, or that each entire shipment of packaged goods is a package. It merely holds that the breaking of one package for use renders the contents of that particular package subject to tax. There is no language in the opinion holding or even suggesting that the breaking of one such package renders taxable the remaining original packages of a single shipment. It was the breaking of the original package with which the Court was concerned, and not the status of the remaining unbroken original packages constituting a part of a shipment.

The two cases cited by the commissioner on page 10 of his brief, *Washington Chocolate Company v. King County,* 21 Wash. 2d, 630, 152 P. 2d, 981 (1944); and *Southern Pacific Company v. City of Calexico,* 288 F., 634 (1923), hardly support the commissioner's position, since both cases vigorously defend the rule of *Brown v. Maryland, supra,* that imported goods are protected from taxation so long as they remain in storage and are not sold or used for the purpose for which they were imported.

The last two authorities discussed in the commissioner's brief are *Stanton v. Los Angeles County*, 177 P. 2d, 804 (1947); and *Mexican Petroleum Corporation v. City of South Portland*, 121 Me., 128, 115 A. 900 (1922). Although these cases hold that the entire shipment is the package, it suffices to say that they are directly opposed to the decisions of this Court and the rule established by those decisions, and they have never been followed by any other court. As a matter of fact, the commissioner has failed to point out that four cases* have been decided in which the courts, on identical facts, have reached an opposite conclusion from that reached in the *City of South Portland* case.

But far more surprising than the commissioner's failure to refer to the relevant state court decisions is his failure to refer to the *Hooven* case. It is possible, perhaps probable, that this Court will dispose of the appeal herein without reference to the *Stanton* case or the *City of South Portland* case, but it is inconceivable that this Court could rule on the question presented without reference to the *Hooven* case. As we have pointed out in our main brief, we believe that the *Hooven* case is controlling for the instant case, and we can only conclude from the commissioner's failure to refer to the *Hooven* case that he fears that may be true. The commissioner's failure to cite *Hooven* is further evidence that this proceeding is merely his attempt to re-argue that case.

Discussion of the equal protection part of this case will be found in appellant's reply brief filed in the companion

Mexican Petroleum Corporation v. The Borough of Roosevelt, Supreme Court of New Jersey, unreported (1919);
City of Galveston v. Mexican Petroleum Corp., 15 F. 2d 208 (District Court, S. D. Texas (1926);
Mexican Petroleum Corp. v. Louisiana Tax Commissioner, 173 La. 604, 138 So. 117 (1931);
Re: Taxes Pacific Guano & Fertilizer Co., 321 Hawaii 431 (1932)

case, *Allied Stores of Ohio, Inc. v. Bowers* (Case No. 10).

Appellant submits in conclusion that its iron ores are imports and therefore protected from state taxation by the United States Constitution.

Respectfully submitted,

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No. ~~385~~ 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

Appeal from the Supreme Court of Ohio

THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 588

THE YOUNGSTOWN SHEET & TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

MOTION TO DISMISS

Appellee, pursuant to Rule 16 (b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the grounds that no substantial federal question is presented thereby, and that the decision of the Supreme Court of Ohio, from which appeal was taken, rests upon adequate nonfederal grounds.

STATEMENT OF THE CASE

The appellant is a resident corporation engaged in the business of manufacturing iron and steel.

Appellant held certain domestic iron ore and raw materials for use in manufacturing and certain finished prod-

ucts for ultimate sale. The Tax Commissioner of Ohio held these properties subject to the Ohio personal property tax despite appellant's claim that the levy against them was unconstitutional on the basis of discrimination in that non-residents holding such property in a storage warehouse for storage only were not required to pay the tax. The Ohio Supreme Court ultimately upheld the Tax Commissioner's action.

Additionally, appellant imported five grades of foreign iron ore for use in its manufacturing processes. These ores were stock-piled on appellant's premises in five separate piles. As need arose for a particular grade of ore it was removed from its stock-pile for use in the manufacturing processes. As an additional shipment of a particular grade of ore was received, it was placed upon and commingled with the existing stock-pile of that grade of ore. The Tax Commissioner determined that these foreign ores had lost identity as imports due to the breaking of import units and the commingling of the ores with domesticated property. This action was likewise affirmed by the Supreme Court of Ohio.

ARGUMENT

All that has been said in the companion case of *Allied Stores of Ohio, Inc., v. Bowers* on the question of discrimination as to merchandise held in a storage warehouse is incorporated herein as though fully restated.

The additional question at issue in this appeal is whether iron ore imported from foreign countries loses its character as an import and becomes subject to personal property taxation by a state because of the domestication and commingling of the ore.

Personal property is made subject to taxation in Section 5709.01, Revised Code of Ohio, as follows:

> "* * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof. * * *"

Section 5711.01, Revised Code of Ohio, defining that property which must be listed for purposes of taxation, reads in part:

> "(A) 'Taxable property' includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code * * *"

Section 5701.03, Revised Code of Ohio, defines personal property:

> "* * * 'personal property' includes every tangible thing which is the subject of ownership, whether animate or inanimate * * *"

Thus the imported iron ores stored at the plant sites of the appellant for use in the appellant's open hearth furnaces or blast furnaces for the production of steel or iron are by definition personal property subject to taxation by the state unless otherwise privileged.

This appeal is concerned with the constitutional privilege provided in Article I, Section 10, of the Constitution of the United States, as follows:

"* * * * * * * * * *

"No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *"

The question presented is not novel. Many decisions have been reported on the question of when an import loses its identity as such and becomes part of the general mass of personal property in a state. The Ohio Board of Tax Appeals in a thorough discussion of the problem here presented refers to many of the leading cases on the subject. In treating of the "original package" theory specific reference is made to the case of *Washington Chocolate Company v. King County*, 21 Wash. (2d), 630, 152 P. 2d, 981, wherein three tests are listed for determining whether imports have lost identity as such. The second paragraph of the syllabus in that case states:

"Imported merchandise loses its constitutional immunity from state taxation (1) when it is no longer in the original package; (2) when the importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state; and (3) when it has been sold by the original importer to a purchaser, even though it remains in the original package."

Item 2 in the above quotation points out the position of the Tax Commissioner in the instant appeal. This theory was also noted by Chief Justice Marshall in the leading case of *Brown, et al., v. The State of Maryland*, 12 Wheat., 419, 6 L. Ed., 678, when he stated at page 441-686:

"* * * it might be premature to state any rule as being universal in its application. It is sufficient

for the present to say, generally, that *when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import,* and has become subject to the taxing power of the State * * *" (Emphasis added.)

The appellant, as before said, imported iron ore from five different foreign countries. These ores were never intermingled, but were carefully kept in separate stock-piles. The appellant attempted at all times to keep on hand a three months' supply of each type of ore. Substantial portions of each stock-pile were removed in the ordinary course of appellant's manufacturing business. Upon arrival at appellant's premises of a subsequent unit of a particular grade of ore, it was placed on top of and commingled with the partially depleted stock-pile of ore of the same kind. This general practice, it is submitted, resulted in a domestication of all of the stock-piled ore. This practice removed from the import its nature as an import and thereby rendered the ore outside the protection of Article I, Section 10, of the Constitution of the United States.

The conclusion of the Supreme Court of Ohio appears at page 126 of the opinion in *Youngstown Sheet & Tube Co. v. Bowers*, 166 Ohio St., 122, and is stated in these words:

> "If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, we do not believe that such protection can extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing."

Appellant claims that this appeal presents a question of great import, a substantial federal question. It is the contention of the appellee that no such question is presented hereby, but that rather the question is merely one of a factual determination: to wit, whether the import lost its character by action of the appellant, and became part of the mass of property of the state. It is submitted that the conclusion of the Supreme Court of Ohio that the import character of the property had been removed was the proper factual determination and should not be reviewed.

CONCLUSION

It is therefore concluded that no substantial federal question is presented in either aspect of this appeal and that the appeal should be dismissed.

Respectfully submitted,

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No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Appeal from the Supreme Court of Ohio

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant.

vs.

SANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

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IN THE

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OCTOBER TERM, 1958

No. 9

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant.

vs.

SANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF OF APPELLEE

QUESTIONS PRESENTED

1. Does Article I, Section 10, Clause 2, of the Constitution of the United States, prohibit state taxation of tangible personal property after the imported property has reached its destination, been put to the use for which it was imported, and lost its identity as an import?

2. Does the proviso contained in Section 5701.08, Revised Code of Ohio, granting exemption from personal property taxation to property of nonresidents of Ohio held in a storage warehouse for storage only, deny appellant equal protection of the laws under the Constitution of the United States?

3. If the appellant is denied equal protection of the laws under the Constitution of the United States, to what relief, if any, is the appellant entitled?

STATEMENT OF THE CASE

The facts of the case have been stipulated (R. 33-36).

The appellant is a resident corporation engaged in the business of manufacturing iron and steel.

Appellant held certain domestic iron ore and raw materials for use in manufacturing and certain finished products for ultimate sale. The Tax Commissioner of Ohio held these properties subject to the Ohio personal property tax despite appellant's claim that the levy against them was unconstitutional on the basis of discrimination in that nonresidents holding such property in a storage warehouse for storage only were not required to pay the tax. The Ohio Supreme Court ultimately upheld the Tax Commissioner's action.

Additionally, appellant imported five grades of foreign iron ore for use in its manufacturing processes. These ores were stock-piled on appellant's premises in five separate piles. As need arose for a particular grade of ore it was removed from its stock pile for use in the manufacturing processes. As an additional shipment of a particular grade of ore was received, it was placed upon and commingled with the existing stock pile of that grade of ore. The Tax Commissioner determined that these foreign ores had lost identity as imports due to the breaking of import units and the commingling of the ores with domesticated property. This action was likewise affirmed by the Supreme Court of Ohio.

SUMMARY OF ARGUMENT

IMPORTS

1. Article I, Section 10, Clause 2, of the Constitution of the United States as interpreted in *Brown* v. *Maryland*, 12 Wheat., 419, and *The License Cases*, 5 How., 504, protects imports from state taxation only so long as they retain their character as such.

2. An import which has reached its destination, has been commingled with the general mass of property in a state and has been put to the use for which imported is not protected from state taxation by Article I, Section 10, Clause 2, of the Constitution of the United States.

3. When a point is reached at which an import can no longer be identified as such, it has become part of the general mass of property in the state and subject to state taxation.

EQUAL PROTECTION

1. Classification for purposes of taxation is a legislative function. If a reasonable basis for the classification exists, it does not lead to denial of equal protection of the laws.

2. If the exemption of property owned by a nonresident and held in a storage warehouse for storage only results in discrimination against the appellant, the only method of reestablishing equality of taxation is to strike the entire proviso granting the exemption to nonresidents since the phrase "belonging to a nonresident" is not separable from the proviso.

3. The Supreme Court of Ohio was correct in refusing to accept appellant's claim because, if the appellant was

correct in its argument that the exemption granted to nonresidents denied appellant equal protection of the laws, proper rules of statutory construction require that only separable portions of a statute which are unconstitutional may be stricken and that the Court should uphold valid provisions which are separable from the unconstitutional portions; the phrase "belonging to a nonresident" is not a separable portion but is rather an integral part of a proviso. Thus, if the entire proviso be stricken, nonresidents will no longer be afforded exemption and further equal treatment will be granted to all taxpayers.

ARGUMENT

I.

IMPORTS

Personal property is made subject to taxation in Section 5709.01, Revised Code of Ohio, as follows:

> "* * * All personal property located and used in business in this state * * * are subject to taxation, regardless of the residence of the owners thereof. * * *"

Section 5711.01, Revised Code of Ohio, defining that property which must be listed for purposes of taxation, reads in part:

> "(A) 'Taxable property' includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code * * *"

Section 5701.03, Revised Code of Ohio, defines personal property:

> "* * * 'personal property' includes every tangible thing which is the subject of ownership, whether animate or inanimate * * *"

Thus the appellant's imported iron ores stored at the plant sites of the appellant for use in the appellant's open hearth furnaces or blast furnaces are personal property subject to taxation by the state unless otherwise privileged.

This appeal is concerned with the constitutional immunity provided in Article I, Section 10, of the Constitution of the United States, as follows:

> "* * * * * * * * *
>
> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *"

The constitutional question occasioned by this provision, and the real problem created, is well expressed in the leading case on this subject, *Brown, et al.*, v. *The State of Maryland*, 12 Wheat., 419, 6 L.Ed., 678. Chief Justice Marshall delivered the opinion of the court, and spoke in part as follows at page 441-686:

> "The constitutional prohibition of the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution."

It is the position of the Tax Commissioner of Ohio that the imported iron ores in question could no longer be described as imports because of the manner in which they have been acted upon by the importer. All of the ores are transported by railroad car from the port of entry into this country to the plant locations near Youngstown. Upon arrival, the cars are routed to the storage yard where they are unloaded. The ores are placed in piles separated as

to origin. These piles are not intermingled; however, ores of the same origin are placed in the same pile from which the withdrawal for use is made, so that a particular type of ore will be placed upon a pile of the same type which was previously imported. These ores are drawn upon as needed for use in appellant's blast furnaces or open hearth furnaces.

The imported ores have thus reached a final destination and have been made available for fulfillment of the purpose for which imported. Withdrawals for use are not made from a particular shipment but from a commingled pile. The ultimate issue presented is then whether such use constitutes a mixture or commingling with the mass of property in the state so as to make such ores lose their character as an import and thus subject the ores to state taxation.

The stipulation contained herein (R. 33-36) clearly indicates that by the method of storage, and day to day use, the bulk has been broken. There is no conceivable way that the individual bulk imports could be distinguished or identified as to the shipment delivered, and the appellant makes no pretense of using ores from any particular shipment.

The bulk imports here under consideration fall on the nether side of the line of demarcation marked by Chief Justice Marshall in *Brown* v. *Maryland*. These stock piles of ores have throughout the years been altered by an admixture of new ores and substantial withdrawals of ores for use in manufacturing.

The ad valorem tax upon the ores here concerned is not levied against a shipment of imported ore which is segregated apart from other ores and held for some future use. This tax is levied against ores in a common stock pile which are clearly in the language of Section 5701.08, Revised Code of Ohio, "* * * utilized in connection with ordinary * * * operations, * * * or when stored or kept on hand

as material * * *." Reason will show that no danger accrues to foreign commerce from such a tax, and, in fact, to hold such items privileged from the tax is to *grant* economic benefit to the import completely outside of the intent of the Constitution. These items are similarly situated with domestic items, and are accorded the same benefits or protection of the state; it must surely follow that the items, although coming from foreign commerce, should bear their fair share of the tax burden. This tax is not imposed upon goods *in transitu* but upon goods *located and used in business* in Ohio, Sections 5709.01 and 5701.08, Revised Code of Ohio.

The conclusion of the Supreme Court of Ohio is contained on page 126 of the official report, 166 Ohio St., 122, and reads:

> "If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such as iron ore as is accorded to goods imported in a package, we do not believe that such protection can extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing."

While the Ohio court's conclusion seems to question the applicability of the import clause to bulk imports, its determination is none the less sound, based as it is upon the use to which the imported property is put. Thus, the Ohio court concluded that the protection of the import clause could not extend to property after it had been commingled with other property in the state and thus made a part of the general mass of property within the state and after the identity of the import had been destroyed by such com-

mingling and removal of portions of it for use in manufacturing.

All of the cases dealing with the problem of the importation of goods from foreign lands recognize that there is a point beyond which the protection of the import clause does not exist. The Ohio court attempted to define its interpretation of that point. The imports in question were at one time within the stream of foreign commerce. They were likewise at one time within the stream of interstate commerce. However, the Ohio tax has been assessed upon the property after it has been removed from the stream of commerce, after the importer has so acted upon the property that it has lost its quality as an import and after it has been incorporated into the mass of property within the state. Only an artificial construction of the import clause could exempt such property from an ad valorem state tax.

Throughout all these cases runs the recognition that there exists or may exist a point at which the constitutional immunity ceases. Likewise, in each of these cases the court has attempted to locate that point preliminary to determining the applicability of the import clause.

In the case of *May* v. *New Orleans*, 178 U.S., 496, 44 L.Ed., 1165, 20 S.Ct., 976, the problem presented involved the importation of small packages contained within a single large package. The court identified the original package as the large container and held that when the large container was opened for sale or delivery the many small packages contained therein became subject to state taxation. This holding was based upon the conclusion that the importer had so acted upon the thing imported that each parcel of the goods had lost its distinctive character as an import.

The Supreme Court of Washington in *Washington Chocolate Company* v. *King County*, 21 Wash. 2d, 630, 152 P. 2d, 981, outlined three tests for use in determining whether imports have lost identity as such. The second paragraph of the syllabus in that case states:

> "Imported merchandise loses its constitutional immunity from state taxation (1) when it is no longer in the original package; (2) when the importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state; and (3) when it has been sold by the original importer to a purchaser, even though it remains in the original package."

As to test 1, we believe that the facts of this case indicate that by commingling and withdrawing the iron ore any original package concept has been removed since by the use put to the property it is no longer in its original form, shape or package. As to test 2, we believe that the facts indicate that by the appellant's acts of stockpiling the imported ore on piles of previously imported ores and of indiscriminately withdrawing for use portions of the last created stock pile, the "importer has so acted upon it that it has lost its character as an import and has become a part of the general mass of property in the state." As to test 3, the iron ore was not imported for sale but was imported for use. The iron ore has been subjected to the use for which it was imported.

In the case of *Southern Pacific Company* v. *City of Calexico*, 288 F., 634,, cotton which was produced, ginned and baled in Mexico was imported into California, destined for transshipment to England. Local authorities sought to tax the property. The court at page 642 identified the controlling question presented as: "Was the property kept segregated from the general mass of property in the state

in such a way that it could always be identified, and not subjected to any beneficial use?"

The California case of *Stanton* v. *Los Angeles County*, 177 P. 2d, 804, bears a close analogy to the instant fact situation. In the *Stanton* case lumber was imported in bulk. Lumber of different shipments was kept separated from other shipments except that subsequent shipments of the same type of lumber were commingled. The court held that while the segregation of the shipments did not destroy the import character, the sale of any part of the whole broke the package. The court reasoned that although the lumber might arrive at the dock without cover, nevertheless the shipment of such articles constitutes the original form or the original package. The court went on to state that the phrase "original package" refers to the unit transported by the shipper and delivered in the exact condition in which shipped. At pages 807 and 808 the court stated:

> "From the authorities above quoted the conclusion is irresistible that the unit of importation is the original package; that such unit only and not its constituent elements is within the exclusive federal jurisdiction. Although a cargo in bulk may arrive at the port of entry in irons, or wrapped and tied with hemp ropes, or encircled with a silken thread or, as a heard of steers, have no binder at all, yet the entire shipment without regard to its exterior wrapper is the original package. A cargo of planks, timbers or logs imported from foreign lands is surrounded by the invisible gossamer woven of law, custom and convention which protects the merchandise from the local tax assessor only so long as it retains the unbroken wrapper in which it entered the port. But when such cargo sheds its invisible cover, even though in the warehouse of the importer, and is so sorted and classified as to facilitate its sale, and portions thereof are sold until the pile is depleted and the remnants thereof are commingled with new shipments of the same type of timbers, also to be offered for sale, then a reasonable construction of section 10 and the decisions which have interpreted

its meaning compel the termination of immunity from local taxation of such broken lots and commingled remnants of imported lumber."

In *Mexican Petroleum Corporation* v. *City of South Portland*, 121 Me., 128, the court subjected to state taxation oil which was pumped from a ship into tanks on shore. In determining the application of the import clause to the oil, the court examined the question of whether the integrity of the import package had been preserved and found that it had not. Thus, through all these cases it can be seen that the court made examination as to what constituted the original package. The court determined whether or not that original package had been broken so as to make the remainder a part of the mass of property in the state.

It is the position of the Tax Commissioner that the import clause was never intended nor can it properly be applied to protect an import which has reached its destination, been commingled with other import shipments so that the identity of the import has been lost, or been changed in extent by the removal of part of the import for use in manufacturing.

CONCLUSION

Since the imported iron ore in question has lost its identity as an import by reason of the use to which it has been put, it is concluded that the constitutional immunity of the import clause can no longer be applied to the property; that the decision of the Supreme Court of Ohio was correct and should be affirmed.

II.

EQUAL PROTECTION

All that has been said in the companion case of Allied Stores of Ohio, Inc., v. Bowers on the question of discrimination as to merchandise held in a storage warehouse or denial of equal protection of the laws is incorporated herein as though fully restated.

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IN THE

Supreme Court of the United States

October Term, 1958

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant,
vs.
STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.
No. 9

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

UNITED STATES PLYWOOD CORPORATION,
Petitioner,
vs.
CITY OF ALGOMA,
Respondent.
No. 44

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF AMICI CURIAE

of
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September 15, 1958.

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IN THE

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October Term, 1958

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UNITED STATES PLYWOOD CORPORATION, *Petitioner,* *vs.* CITY OF ALGOMA, *Respondent.* ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN	No. 44

Brief Amici Curiae of Bruce Bromley and Roswell Magill

The Issue in the Above-entitled Cases

The underlying issue in the two cases now before this Court is whether exclusive jurisdiction to tax raw materials that are imported by American industry for use in manufacture is vested in the Congress under Article I, Section 10, Clause 2 of the Constitution (hereinafter sometimes referred to as the "Import-Export Clause"), which provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The exclusive jurisdiction of the Congress over taxation of imports must, of course, be reconciled with the jurisdiction of the states to levy taxes upon property within their respective boundaries. At some point of time, imported raw materials lose their status as "imports" within the meaning of the above-quoted language of the Constitution and become subject to state taxation.

The precise issue presented in the two cases now before this Court is: at what point of time do raw materials imported by American industry for use in manufacture lose their status as imports so as to be subject, without the consent of the Congress, to taxation by the states?

In Case No. 9, the Ohio Supreme Court held that iron ores imported from foreign countries by a domestic steel

company for use in the manufacture of iron and steel products and held in its storage yard, in the same form in which imported, awaiting transfer to its manufacturing facilities were subject to a general *ad valorem* property tax of the state. In Case No. 44, the Wisconsin Supreme Court held that veneers imported by a domestic plywood company and held in its warehouse, in the original packages in which imported, awaiting transfer to its factory were subject to a general *ad valorem* property tax of the state. The two state Supreme Courts, by quite different lines of reasoning, arrived at decisions which are unwarranted departures from the rule long established by this Court and generally accepted by the states, and each of such decisions, if affirmed, would mean, in effect, that the exclusive jurisdiction of the Congress to control the taxation of imports, as provided by the Import-Export Clause, does not apply to imported raw materials.*

Interest of the Amici Curiae

The underlying issue in the two cases now before this Court is of great general interest. Raw materials from abroad are vital to our national economy and it continues to be as important today as it was in 1787 that exclusive jurisdiction to tax imports be vested in the Federal Government. Although the two state Supreme Courts followed

---

*This brief does not relate in any way to (i) that portion of Case No. 9 which involves the constitutionality of the Ohio statute under the "equal protection clause" of the Constitution (Section 1 of the Fourteenth Amendment) or (ii) that portion of Case No. 44 which involves the holding by the Wisconsin Supreme Court that a portion of the inventory in that case (the raw lumber) had already been subjected to a manufacturing process by being stacked for air drying.

different lines of reasoning in sustaining the state taxation in their respective cases, the two cases cannot be considered as presenting different problems; rather they should be regarded as presenting different approaches to the same underlying issue which this Court must settle at this time.

This brief is filed by the undersigned, with the written consent of all parties to the cases, in order to present to this Court the reasons why we think that the decisions of the Ohio Supreme Court and the Wisconsin Supreme Court, in so far as they relate to the issue stated above, should not be allowed to stand.

A number of clients of the law firm of which the undersigned are members import raw materials for use in the manufacture of their products and are necessarily interested in the final resolution by this Court of the issue presented in the two above-entitled cases.

Summary of Argument

1. Each of the cases before this Court involves the attempt by a state to impose a tax on imports that was declared to be unconstitutional by this Court in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 (1945). These cases afford an opportunity for this Court to reaffirm the current vitality and the wisdom of the constitutional principle that taxation of imports is the exclusive concern of the national Government.

2. Under the rule first laid down by this Court in *Brown* v. *Maryland*, 12 Wheat. 419 (U. S. 1827), the thing imported, while remaining the property of the importer, in his warehouse, in the original form or package in which

it was imported, is not subject to state taxation. This Court has reaffirmed that rule many times, most recently in its decision in the *Hooven* case, *supra*.

3. The intent and purpose of the Import-Export Clause of the Constitution precludes any distinction between its application to raw materials imported "in packages" and its application to raw materials imported "in bulk", or between goods imported by a merchant for sale and goods imported by a manufacturer for use; nor is any such distinction indicated by the decisions of this Court or by the decisions of the state courts generally.

4. In an effort to evade the effect of this Court's decision in the *Hooven* case, the Ohio Supreme Court and the Wisconsin Supreme Court have relied on various asserted distinctions, none of which can stand analysis, and all of which are, in fact, only designed to permit the states to encroach, particularly in the case of raw materials imported for use by an importer, upon the exclusive jurisdiction of the Congress, under the Import-Export Clause, to decide whether and how imports shall be taxed.

5. This Court's decision in the *Hooven* case is dispositive of the issue stated above which is presented in the two cases now before this Court.*

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*See footnote, page 3, *supra*.

ARGUMENT

I.

THE MATERIAL FACTS AND THE ISSUES IN EACH OF THE CASES BEFORE THIS COURT ARE THE SAME AS THOSE IN *HOOVEN & ALLISON CO.* v. *EVATT*, AND JUST AS THE TAX IN THAT CASE WAS UNCONSTITUTIONAL, SO THE TAXES NOW SOUGHT TO BE SUSTAINED ARE UNCONSTITUTIONAL.

In *Hooven & Allison Co.* v. *Evatt, supra,* Chief Justice Stone, speaking for the majority of this Court, struck down as unconstitutional the Ohio *ad valorem* personal property tax as applied to imported raw materials held in storage by the importer for use in its manufacturing process.*

In the *Hooven* case, the raw materials were hemp, jute, sisal and other raw fibers imported from the Philippine Islands and other foreign countries. In Case No. 9, the raw materials are iron ores imported from five different foreign countries. (Case No. 9, R. 34) In Case No. 44, the raw materials are veneers imported from three different foreign countries. (Case No. 44, R. 30)

In the *Hooven* case, the raw fibers were stored by the importer in its warehouse awaiting its use of them in the manufacture of rope products. In Case No. 9, the iron ores were stored in the importer's storage yard awaiting transfer to ore stock bins and stock houses in its plant for ultimate use in the manufacture of iron and steel. (Case No. 9, R. 35) In Case No. 44, the veneers were stored in the warehouse of the plywood company, the importer, awaiting transfer to its factory for use in the production of veneered wood products. (Case No. 44, R. 31)

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*That Ohio tax was the same Ohio tax the application of which to raw materials imported by a steel company for use in its manufacturing process has been sustained by the Supreme Court of Ohio in Case No. 9.

In each case, the raw materials (fibers, ores, veneers) remained in the form in which imported.

The legally material facts in the present cases cannot be distinguished from the facts in the *Hooven* case. The factual difference—that in these cases iron ores or veneers are sought to be taxed, while in the *Hooven* case raw fibers were sought to be taxed—is not material.

As shown in Point IV below, the Ohio Supreme Court and the Wisconsin Supreme Court have each attempted to shift the footing on which it would uphold a tax on imported raw materials. But the basic facts and the issues in these cases and those in the *Hooven* case are the same. These cases are the *Hooven* case all over again. Just as the tax on the imported raw fibers in *Hooven* was unconstitutional, so is the tax on imported iron ores in Case No. 9, and the tax on the imported veneers in Case No. 44, unconstitutional.

Chief Justice Stone expressly recognized that the Import-Export Clause was intended to confer upon the national Government the exclusive power to determine when and how imports should be taxed. 324 U. S. at 656. It is just as important today as it was at the time when the Constitution was adopted that the states should not be permitted to encroach upon Federal authority in this field. As the President noted in his 1958 State of the Union Message to the Congress, world trade supports a significant segment of American industry and agriculture, providing employment for four and a half million American workers, supplying our ever-increasing demand for raw materials, and providing the opportunity for American free enterprise to develop on a world-wide scale.*

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*See 104 Cong. Rec. 174 (January 9, 1958). The President concluded the portion of this Message dealing with world trade with the following statement:

> "America is today the world's greatest trading nation. If we use this great asset wisely to meet the expanding demands of the world, we shall not only provide future opportunities

The Randall Commission on Foreign Economic Policy, in the chapter of its Report entitled "United States Dependence on Imported Materials",* notes that this nation depends upon foreign sources for over 30% of its requirements of copper, lead and zinc; over 50% of its requirements of tungsten, bauxite and antimony; over 75% of its requirements of chrome and manganese; practically all of its nickel requirements; and all its requirements of tin, natural rubber and jute. In addition, each year its requirements of crude oil, iron ores, uranium ores, coffee, cocoa, and many other basic raw materials and commodities are supplied to an increasing extent from foreign sources.

In his Message to Congress on the 1958 budget, the President stated:**

> "We live in a world of economic, no less than political, interdependence. As the greatest producer, consumer, and exporter in the world, the United States must be a dependable market for foreign goods if mutually beneficial trade is to grow and prosper. The Reciprocal Trade Agreements Act should be extended for 5 years beyond its expiration date of June 30, 1958, with certain new authority for the President to negotiate gradual and selective tariff reductions. Legislation should also be enacted to authorize United States membership in the Organization for Trade Cooperation to improve the administrative efficiency of our trade agreements with other countries."

The ability to control taxes on imported goods, and thereby to encourage or to discourage the importation of par-

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for our own business, agriculture, and labor, but in the process strengthen our security posture and other prospects for a prosperous, harmonious world."

*See Commission on Foreign Economic Policy, Report to the President and the Congress, H. R. Doc. No. 290, 83rd Cong., 2d Sess. 39-40 (January, 1954).

**104 Cong. Rec. 337 (January 13, 1958).

ticular kinds of goods, or goods from particular sources, is today an important factor in the field of United States foreign policy.

It is too clear to require any argument that the taxation of imports, affecting as it does the relations of this country with other countries, is a matter which requires a single authority and uniformity of policy. It is too much to expect that such uniformity could be attained if the authority were in the hands of 48 states rather than exclusively in the national Government. This Court will take notice that, over the years, the interests of the several states with respect to foreign trade, tariffs, free trade and similar matters have been diverse. It is not only possible but extremely likely that there would be great variances between the policies pursued by the several states and direct conflict between the policies pursued by some of them and the policies which the national Government desired to follow. If the decisions in the Ohio and Wisconsin cases now before this Court are allowed to stand, the formulation of a uniform national policy would be impossible.

The constitutional immunity of imports from state taxation, which results in exclusive national Government control in this field, is by no means "an echo from an era that is past." It is vitally important today that the raw materials which we must now import to sustain our domestic production shall not, without the consent of the Congress, be subjected to state taxes, while they remain imports and before they are used in manufacture.

II.

FOR MORE THAN 130 YEARS THIS COURT HAS ADHERED TO THE RULE THAT THE THING IMPORTED, WHILE REMAINING THE PROPERTY OF THE IMPORTER, IN HIS WAREHOUSE, IN THE ORIGINAL FORM OR PACKAGE IN WHICH IT WAS IMPORTED, IS NOT SUBJECT TO STATE TAXATION.

In *Brown* v. *Maryland*, Chief Justice Marshall carefully reviewed the scope and purposes of the Import-Export Clause of the Constitution. From that decision to the present day, the analysis made by the Chief Justice and the rule formulated by him have been followed by this Court in all cases involving the assertion by a state of the right, without the consent of Congress, to levy a tax on imports.

The Approach.

The first step in Chief Justice Marshall's analysis was to determine the meaning of the word "imports" as used in the Import-Export Clause of the Constitution. He found that a duty on "imports" included not only a tax on the act of importation, but also a tax on "the thing imported". Recognizing that the constitutional prohibition was not intended to protect imported goods indefinitely from the state taxing power, the Chief Justice concluded that "there must be a point of time when the prohibition ceases, and the power of the state to tax commences". 12 Wheat. at 441. It is this "point of time" which must be determined in every case.

In the *Hooven* case, Chief Justice Stone reaffirmed, as had many of those speaking for this Court before him, Chief Justice Marshall's approach to the problem, by stating that

there is a

> ". . . constitutional necessity that the immunity [from state taxation], if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until *a point is reached, capable of practical determination,* when it can fairly be said that it has become a part of the mass of taxable property within a state. . . ." (324 U. S. at 667) (Italics added)

The Rule.

Chief Justice Marshall's rule for fixing the "point of time" capable of practical determination at which imported goods become subject to the taxing power of states has been repeated in every case heretofore decided by this Court which has considered the problem. And in every such case, that rule has served as the cornerstone for decision.

In holding the Maryland levy to be a prohibited tax on imports, Chief Justice Marshall said:

> ". . . It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution." (12 Wheat. at 441-42)

Many of the leading justices who have sat on this Court have given express approval to the rule laid down by Chief Justice Marshall.

Chief Justice Taney (who argued for the State of Maryland in *Brown* v. *Maryland*), after what he called

"further and more mature reflection", expressed approval of Marshall's views in these words:

> ". . . Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government: . . ." *License Cases*, 5 How. 504, 575 (U. S. 1847)

In *Low* v. *Austin*, 13 Wall. 29 (U. S. 1871), Mr. Justice Field gave full approval to the statements of Marshall and Taney.

Mr. Justice (later Chief Justice) White, in contrasting the *absolute* constitutional prohibition against state taxation of imports, with the *implied* constitutional prohibition of state taxation which constitutes a burden upon interstate commerce,* stated the *Brown* v. *Maryland* rule approvingly:

> ". . . Thus, in *Brown* v. *Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such." *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 521 (1904)

In *Gulf Fisheries Co.* v. *MacInerney*, 276 U. S. 124 (1928), Mr. Justice Brandeis applied Chief Justice Marshall's reasoning to the facts of that case and determined that certain bulk imports (raw fish) had been processed prior to

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*The attempts to levy state taxes on imports in the two cases before this Court do not involve the problem of what constitutes an undue burden on interstate commerce. Therefore, this brief does not discuss the relatively large number of cases (such as *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506 (1923)) which have carefully distinguished the constitutional problems in the field of state taxation which arise under the Commerce Clause from such of those problems as arise under the Import-Export Clause.

imposition of the tax and so were no longer "imports" within the constitutional prohibition. It is apparent from Mr. Justice Brandeis' opinion that he would not have regarded the mere storage of the fish, without processing, as justifying the imposition of the tax.

And, of course, in the *Hooven* case, Chief Justice Stone set forth the above-quoted language of both Marshall and Taney, and restated at length, and followed, the rule each advocated.

No decision of this Court can be interpreted to sustain the attempt by a state to tax raw materials imported by a manufacturer and held in storage by him in the same form or package in which imported.

III.

THE IMPORT-EXPORT CLAUSE OF THE CONSTITUTION APPLIES WITHOUT DISTINCTION TO ALL IMPORTS, WHETHER "IN PACKAGES" OR "IN BULK" AND WHETHER FOR SALE OR FOR USE.

The term "imports" as used in the Import-Export Clause obviously is not restricted to any particular kind or classification of goods. It embraces all goods brought into the United States from foreign countries. There is no basis either in reason or in authority for any differences in the application of the Import-Export Clause, depending upon whether the goods are imported "in packages" or "in bulk", or whether for sale or for use by the importer. In all cases, the Federal Government has the exclusive jurisdiction to tax the import and the states have no authority, without the consent of the Congress, to do so.

In the two cases now before this Court, the issue is raised in Case No. 9 as to raw materials imported in bulk for use by the importer and in Case No. 44 as to raw materials imported in packages for use by the importer. In

another case, the goods, whether in packages or in bulk, may have been imported for sale by the importer.

The question, in each case, is when do the goods or raw materials which are brought into the United States cease to be imports?

Brown v. *Maryland* establishes that an import does not cease to be an import simply because it has been delivered to its destination. Something more must happen. In the case of goods in a package that something more is the sale of the package or the opening of the package. In the case of raw materials imported in bulk, since there is no package, the putting to use or the selling of the raw materials marks the point of time at which import status ceases.

As to a possible distinction between goods imported for sale and goods imported for use.

In the *Hooven* case, this Court was divided on the question whether a distinction between goods imported for sale and goods imported for use was justified. Chief Justice Stone speaking for the majority said:

> ". . . We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports any sooner or more readily than imports for sale." (324 U. S. at 667)

In almost the same words, the Supreme Court of the State of Washington, in a case involving an attempt by that State to tax cocoa beans imported by a chocolate company and stored in its warehouse pending use in the manufacture of chocolate, had held that the Import-Export Clause of the Constitution applied in the case of goods imported for use as well as in the case of goods imported for sale, saying:

> ". . . We find no reason or authority for distinguishing between imports intended for sale and

those intended for use by the importer in some manufacturing process." *Washington Chocolate Co.* v. *King County*, 21 Wash. 2d 630, 652, 152 P. 2d 981, 992 (1944)

In the *Hooven* case, Chief Justice Stone stated the rule applicable to goods imported for use as follows:

". . . the immunity is adequately protected and the state power to tax is adequately safeguarded if, as has been the case ever since *Brown* v. *Maryland, supra,* an import is deemed to retain its character as such 'while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported,' see *Brown* v. *Maryland, supra,* 442, or until put to the use for which it was imported. Chief Justice Marshall, in *Brown* v. *Maryland, supra,* pp. 442-443, rejected the suggestion that 'an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.' Plainly if and when removed from the package in which they are imported or when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end. *It is quite another matter to say, and Chief Justice Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported.* . . ."

". . . .

"This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation *when they are subjected to the manufacture for which they were imported,* *May* v. *New Orleans, supra,* 501; *Gulf Fisheries Co.* v. *MacInerney, supra,* 126; *McGoldrick* v. *Gulf Oil Corp., supra,* 423, *or* when the original packages in which they were imported are broken, *Low* v. *Austin, supra,*

34; *May* v. *New-Orleans, supra,* 508-509. . . ." (324 U. S. at 665-66) (Italics added)

As to a possible distinction between goods imported in packages and goods imported in bulk.

Although the rule of *Brown* v. *Maryland* is sometimes referred to as the "original package" rule, Chief Justice Marshall's phrase *"the original form or package in which it was imported"* has been repeated in every subsequent decision by this Court dealing with the subject. And the clear indication in this Court's opinions and the state court decisions generally are to the effect that the rule of *Brown* v. *Maryland,* as affirmed in the *Hooven* case, applies to goods imported in bulk, as well as to goods imported in packages.

Four cases have dealt with imported crude oil. In three of those cases the courts held that the constitutional immunity from state taxation was applicable to the crude oil although it was not packaged. The attempts to have the courts treat the ship as "the original package" failed. The immunity survived the pumping of the oil from the ship into storage tanks on shore. *Mexican Petroleum Corp.* v. *Borough of Roosevelt,* Case No. 209, (Sup. Ct. N. J., Oct. 14, 1919) (a copy of the decision, which is unreported, is annexed as Appendix A); *Galveston* v. *Mexican Petroleum Corp.,* 15 F. 2d 208 (S. D. Tex., 1926); *Mexican Petroleum Corp.* v. *Louisiana Tax Commission,* 173 La. 604, 138 So. 117 (1931).

In the earliest of those decisions, the *Borough of Roosevelt* case, the court, with homely simplicity, said:

> ". . . It is conceded that if this oil was imported in barrels or other packages, it would not be taxable so long as the packages remained unbroken, or disposed of in such packages. We are unable to see how it can be said that the importation has lost its character simply because it is pumped into retain-

ing tanks in this state, for so long as it remains there it is not mingled with the mass of other property. If this be not so, then the character of the retainer would permit the imposition of taxes in violation of the Federal Constitution." (See p. 34, *infra*)

In the most recent of those decisions, the *Louisiana Tax Commission* case, the court said with reference to Louisiana's power to tax imported crude oil held in on-shore storage tanks as follows:

> "... Our appreciation of Brown v. Maryland, and the authorities, cited, resting upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the manner of importation, it suffices that the import, to retain its character as such, remain in the original form in which imported. Some property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages. It was not the intention, however, to exclude such property from the immunities of imports. Of this nature is crude oil. The only practicable way of importing it is in bulk. . . ." (173 La. at 614, 138 So. at 120)

The fourth case involving imported crude oil, *Mexican Petroleum Corp.* v. *City of South Portland*, 121 Me. 128, 115 Atl. 900 (1922), held that the imported crude oil became subject to the state taxing power the instant it was unloaded from the oil tankers and pumped into on-shore storage tanks. This decision was expressly disapproved by the court in the *Louisiana Tax Commission* case. It was also considered and its reasoning rejected by this Court in *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414 (1940). In the latter case, the City of New York suggested that removal of imported crude oil from a ship might constitute the breaking of an original package, citing the

City of South Portland case. (Brief for Petitioner upon Reargument, p. 18) In his opinion, speaking for a unanimous Court, Mr. Justice Stone said:

> "For present purposes we may assume, without deciding, that had the crude oil not been imported in bond it would, *upon its manufacture*, have become a part of the common mass of property in the state and so would have lost its distinctive character as an import and its constitutional immunity as such from state taxation." (309 U. S. at 423) (Italics added)

The decision in the *City of South Portland* case must be regarded as wrong, but unappealed.* It is in direct conflict with the analysis and rule laid down by this Court. Its only merit is to illustrate the power which, but for the Import-Export Clause of the Constitution, the seaboard states would have to tax imports to the prejudice of the interior states.

In *Re Taxes Pacific Guano & Fertilizer Co.*, 32 Hawaii 431 (1932), Hawaii sought to tax phosphate rock, imported in bulk and held in storage by the importer. The court held that, so long as the raw materials remained in their "original form" in the ownership and the warehouse of the importer, they retained their distinctive status as imports and remained immune from local taxation.

In an opinion relating to ilmenite ore imported from India, the Maryland Attorney General has ruled that

> ". . . The fact that an imported material may be of such character as not to be susceptible to packaging does not destroy the [constitutional] immunity as long as it is not sold or appropriated to the use for which it is designed by the importer. In other words, if the material imported remains in the condition in which it was brought in, the immunity continues

*Reasoning similar to that of the *City of South Portland* case was used by a California District Court of Appeal in *E. J. Stanton & Sons* v. *County of Los Angeles*, 78 Cal. App. 2d 181, 177 P. 2d 804, *cert. denied*, 332 U. S. 766 (1947).

to attach." 30 Ops. Atty. Gen. (Md.) 220, 221 (1945).

In applying the established rule to the imported iron ores in Case No. 9 and the imported veneers in Case No. 44, it is clear that the goods in each case

(1) "remained the property of the importer";

(2) "remained in the importer's warehouse" (in the case of the ores in an outdoor storage yard, "a structure having two parallel walls" (Case No. 9, R. 34));

(3) in the case of the ores, remained "in the original form" in which imported, and in the case of the veneers, remained in the "original package" in which imported, in each case not mingled with, but clearly segregated from, the "mass of property in the country"; and

(4) had not yet been used in the manufacturing process for which they were imported.

IV.

THE ASSERTED DISTINCTIONS UPON WHICH THE OHIO SUPREME COURT AND THE WISCONSIN SUPREME COURT RELIED IN ATTEMPTING TO DISTINGUISH THE FACTS IN THE CASES NOW BEFORE THIS COURT FROM THE FACTS IN THE *HOOVEN* CASE DO NOT STAND ANALYSIS.

It seems clear, as stated earlier, that the decisions of the Ohio Supreme Court and the Wisconsin Supreme Court now before this Court for review represent attempts to sustain state taxes that are on all fours with the tax declared to be unconstitutional by this Court in the *Hooven* case. Goods, particularly raw materials, imported by American industry for use do, indeed, represent an impor-

tant part of our total imports, and, from the point of view of the individual state taxing authority, the sooner such goods can be subjected to local taxation the better. But that conflict between the local interest and the national viewpoint, which was the occasion for the inclusion of the Import-Export Clause in the Constitution, has always existed and highlights the necessity for the exclusive jurisdiction of the Federal Government over taxation of imports.

Neither the Ohio Supreme Court nor the Wisconsin Supreme Court purported to rule in direct conflict with this Court's decision in the *Hooven* case. Each rested its decision, however, on grounds which, if allowed to stand, would, as a practical matter, mean the end of exclusive Federal jurisdiction to tax imported raw materials prior to their use or sale.

The Ohio Decision

In concluding that the imported iron ores in the steel company's storage yard were subject to the Ohio tax, the Ohio Supreme Court sustained the order of the Tax Commissioner which had, in effect, dismissed the *Hooven* case by limiting its application to imports in "original packages". (Case No. 9, R. 5-8) The Ohio Board of Tax Appeals, which reversed the Commissioner's order, noted that one advantage of the "newly conceived theory" advanced by the Commissioner was that it "would permit state taxation of that which the constitutional provision prescribes shall not be taxed." (Case No. 9, R. 22)

The Ohio Supreme Court did not, of course, expressly presume to restrict this Court's decision in *Hooven*. It could hardly have done so because it was its own opinion holding that the Import-Export Clause of the Constitution did not grant immunity from state taxation in the case of imports for use that was overruled by this Court in *Hooven*. Rather, the Ohio Supreme Court attempted to mask the basic reas-

sertion of its original holding and to draw a herring across the trail, by two arguments *viz.*: that the imported ores in the storage yard were no longer "imports" because (1) shipments of iron ore had been added by the steel company to its stockpiles of prior shipments of the same grade of ore imported from the same place, and (2) portions of the ore previously in storage had been removed to stock bins and stock houses in the steel company's plant for use in manufacturing.

But it is clear that by grounding its decision on the facts that (1) identical imported ores were added to existing stockpiles of ores imported from the same sources, and (2) some withdrawals from existing stockpiles for transfer to the plant had previously occurred, the Ohio court, in effect, withdrew from *all* raw materials imported in bulk the immunity from state taxation that the Constitution affords to imports generally. The court might as well have said that the separate lumps of ore constituting a single shipment had been commingled; or that the importer at his peril must use simultaneously all the raw materials in any given shipment which he imports. The facts are that there was no commingling in any individual stockpile with anything other than identical ore imported from the same source (Case No. 9, R. 35); there was no commingling with anything subject to state taxation. The fact that some ore had been withdrawn from storage and transferred to the plant for use did not and could not mean that there had been any use of the ores remaining in the storage yard.

According to the reasoning of the Ohio Supreme Court it would have made a difference if each shipment of a particular grade of ore had been stored in a separate pile and if, when any part of a pile was withdrawn and transferred to the plant for use, the entire pile had been withdrawn and transferred at the same time. Such a procedure, even if feasible, would add nothing to demonstrate that

the ores remaining in the importer's storage yard continued in the same form in which imported and had not been subjected to the manufacturing process. Certainly it would be a silly application of the constitutional provision to make the result turn on the area of the storage yard or the number of square feet of floor space in the warehouse of a particular manufacturer-importer. The rule should not lead to one result in the case of the importer who has a storage yard of sufficient size to permit each shipment of a particular grade of ore to be stockpiled in a separate pile and to another result where the importer is compelled to combine in a single pile successive shipments of identical ores. The Ohio court's decision, if allowed to stand, would, as a practical matter, mean that the Federal jurisdiction to tax imports, when they consist of raw materials imported in bulk, is no longer exclusive.

Neither of the Ohio court's grounds for evading *Hooven* is valid.

Under the cases, the addition of a shipment of raw materials imported in bulk to a stockpile consisting of an earlier shipment of identical raw materials imported in bulk from the same source obviously is not a putting to use of either shipment or a mixing it up "with the mass of property in the country" (*i.e.*, property not having import status).

Also, under the cases, import status ceases only as to that part of the raw materials put to use or sold. The sale of one package or the opening of one package for the purpose of putting to use or selling its contents does not change the status as imports of the other packages stored in the same place. So also the raw materials remaining in stockpile, after a portion of them has been sold or used, retain their status as imports, since they remain in the "original form" in which imported and have not in any way been put to use or otherwise, in the words of Chief Justice Marshall, "become . . . mixed up with the mass of property in the country" or, in the words of Chief Justice

Stone, "become a part of the mass of taxable property within a state".

Even if it be conceded that the iron ores stored in the steel company's storage yard would one day be transferred to the plant for ultimate use in the manufacture of iron and steel products, it remains clear that, so long as they remain in the storage yard, they have not been subjected to the manufacturing process. It is elementary that the status of goods on the tax date is what counts. *Coe* v. *Errol,* 116 U. S. 517 (1886). Where goods were on the day before the tax date or where they may be, or what their status may be, on the day after the tax date is not material. If the iron ores retained their status as imports on the tax date, they may not be taxed by the state, even though it may be expected that at a future date they will be subjected to the manufacturing process and thereby lose their status as imports and become subject to taxation by the state.

The crude oil cases involving attempts by a state to tax oil pumped into on-shore storage tanks illustrate the shallowness of the Ohio court's reasoning. In each of those cases, the crude oil sought to be taxed was pumped by the importer into storage tanks containing previously imported oil of the same grade, and from time to time the oil in the storage tanks was withdrawn by the importer for use or for sale. Nevertheless, with the exception of the aberrational decision in the *City of South Portland* case, the courts have consistently refused to attach any significance to those facts and have declared the attempted tax to be unconstitutional.

As the court said in *Mexican Petroleum Corp.* v. *Louisiana Tax Commission, supra*:

> "... There was no change here in the oil through a process of mixing, for the oil put in each tank was identical in kind and grade with that already in it. Besides, the record justifies the conclusion that the

> oil already in the tanks was oil imported by plaintiff, and still retained its character as an import, and hence there was no mixing of the oil with oil that had become incorporated into the general mass of the property of the country." (173 La. at 616, 138 So. at 121)

In a case involving iron ores, rather than crude oil, the Attorney General of Maryland has considered the status of raw materials imported in bulk and has ruled that

> "So long as ores from different foreign sources are kept in separate stockpiles in the same form and condition in which received, they would, in our opinion, retain their original characteristics as imports." 2 CCH Maryland State Tax Reporter para. 200-152 (Opinion dated December 19, 1956)

See also *Re Taxes Pacific Guano & Fertilizer Co., supra.*

There was no contention in *Low* v. *Austin, supra,* that the cases of French wine were subject to the California tax on the ground that one shipment was warehoused with another shipment or on the ground that from time to time a case of wine may have been withdrawn for sale or use by the importer. There was no contention in *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama,* 288 U. S. 218 (1933), that all the 33 million pounds of nitrate of soda held in storage were subject to the Alabama tax because various shiploads of nitrate had been stored together, or because some bags of nitrate had been removed from storage from time to time for sale by the importer. Nor was there a contention in the *Hoover* case, where imported fibers were from time to time added to the inventory of fibers stored in the warehouses and where some of that inventory was from time to time withdrawn and transferred to the factory for use in manufacture, that all the imported fibers in storage were subject to tax simply because different shipments of identical imported fibers were stored together or because portions of

them were used from time to time in the manufacture of rope products.

We cannot conceive that this Court would have considered seriously any such contention if it had been made by the state taxing authorities in any of those cases.

If the steel company in Case No. 9 had sold portions of its ores, let us say by the ton, it would be clear under *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama* that the sale of such portions of its ores would not make the remaining portions of its inventory any the less imports, or subject such remaining portions to state taxation without the consent of the Congress. If the unreal conditions imposed by the decision of the Ohio Supreme Court, namely, that shipments of like raw materials may not be stored together and that if any part of a shipment is used the entire shipment is deemed to have been used shall prevail, the Import-Export Clause will no longer have any application to imported raw materials. These conditions, as pointed out, add nothing to the practical determination of when a portion of an inventory of imported raw materials in fact becomes "work in process", and, in fact, would necessarily mean the end of the immunity for such imports.

The Wisconsin Decision

In the Wisconsin case, the goods taxed were veneers stored by the importer in his warehouse in the original packages in which imported awaiting use in its manufacturing process. So far as such veneers are concerned the question of raw materials imported in bulk was not present.*

*The case also involved lumber imported in bulk as to which the Wisconsin Supreme Court said "The lumber is not protected from taxation by the original package doctrine, for it was unpackaged . . .", a view quite inconsistent with the great weight of authority. The Wisconsin case also involved the contention, accepted by the Supreme Court of Wisconsin, that the imported lumber had been subjected to a manufacturing process by being air-dried, an issue not discussed in this brief. See footnote on page 3, *supra*.

The tax was assessed on only an arbitrary part (50%) of such veneers, and the tax was sustained by the majority opinion of the Wisconsin Supreme Court, in purported reliance upon Chief Justice Stone's remarks in the *Hooven* case about "Current Operational Needs".

A careful analysis of the Chief Justice's remarks will reveal that the Wisconsin courts distorted his meaning and twisted the phrase "current operational needs" into an unconstitutional umbrella under which Wisconsin may tax imported goods. In order to understand the true thrust of the Chief Justice's comments, it is only necessary to turn to the Record in the *Hooven* case, the brief for the State of Ohio in that case and Mr. Justice Black's dissenting opinion. Each of those sources reveals in its own way, and together they demonstrate conclusively, that the finding of fact by the Wisconsin taxing officials, sustained by the Wisconsin court, that half the imported veneers constituted "current operational needs" is only a transparent expediency to justify the imposition of an unconstitutional tax.

This is what the Chief Justice said:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no

basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." (324 U. S. at 667)

Testimony of Mr. Martin before the Ohio Board of Tax Appeals.

Mr. Martin, the general manager of Hooven & Allison Co., when asked how long the imported fibers were kept in the warehouses before they were used, replied:

> "... it might be we would need the stuff as soon as it got there and again we might not; it comes from long distances *and we do not carry any more inventory than we need to;* ... we attempt to run our business with a *minimum working inventory,* of course." (Record, p. 42, *Hooven & Allison Co.* v. *Evatt*) (Italics added)

Mr. Martin was then asked whether the Company made a bookkeeping entry to show that fibers had been removed from the warehouses. He replied that:

> "... each bale of fiber as it is removed from the raw material warehouse becomes, according to our records, in process. Of course we have to batch and treat this stuff; *it may not be used for a couple of days;* but as soon as it leaves the warehouse it is charged in process; the usual procedure in any class of goods, I suppose.
>
> "... If they are taken out of the warehouse they are charged in process ..." (Record, p. 43, *Hooven & Allison Co.* v. *Evatt*) (Italics added)

The testimony reveals that Hooven & Allison Co. carried only a minimum working inventory, no more than it needed to, and that bales of fiber were sometimes not immediately used upon their withdrawal from storage and transfer to the Company's factory.

The brief for the State of Ohio

On the basis of the above-quoted portions of the Record, Ohio's principal argument before this Court in the *Hooven* case was that the raw fibers held in its warehouse by Hooven & Allison Co. had lost their status as imports protected by the Constitution because maintenance of "a minimum working inventory" constituted actual *use* of such fibers. Thus, in its summary of argument, Ohio stated:

> "2. . . . In order to keep its plant in constant operation, it was necessary for the petitioner to keep a 'backlog' or supply of fibers in its warehouses. The petitioner always operated its business 'with a minimum working inventory' and never bought fibers for the purpose of sale. Under these circumstances, it is contended that the petitioner has used the fibers just as truly as if it had broken the original packages and started them through its mills." (Brief for Respondent, pp. 6-7, *Hooven & Allison Co.* v. *Evatt*).

In the light of the Record and the arguments advanced by the State of Ohio, the observation of Chief Justice Stone regarding "current operational needs" becomes clear. First of all he says: "It cannot be said that the fibers were subjected to manufacture when they were placed *in petitioner's warehouse*". This statement is made even though the Record clearly established that all the warehoused fibers together constituted a minimum working inventory. Next the Chief Justice says that it is "unnecessary to decide whether . . . the presence of some fibers *in the factory* . . ," would render those fibers subject to state taxation. Although the company had paid without protest the tax on such of the fibers as had already been transferred to its factory, and thus it was unnecessary for this Court to decide the status of those fibers, it is apparent from the Chief Justice's second sentence that he considered it possible that even fibers in

the factory itself, if in their original packages, might be still immune from state taxation. Finally the Chief Justice says that "the record affords no basis for saying that *any part* of petitioner's fibers, stored in its warehouse were required to meet such immediate current needs", thus rejecting Ohio's argument.

If we apply the foregoing analysis to the facts of Cases No. 9 and No. 44, we find:

As applied to the imported iron ores in Case No. 9, the question would be whether the ores removed from the stockpiles in the storage yard and deposited in the stock bins and stock houses in the steel company's plant became subject to state taxation.

As applied to the imported veneers in Case No. 44, the question would be whether veneers removed from storage in the warehouses and transferred to the plywood company's factory became subject to state taxation prior to use or to breaking of the packages.

Just as in *Hooven*, however, those questions were not put in controversy in the state courts and are not now before this Court.

When the Chief Justice went on to say that the "record affords no basis" for saying that *"any part"* of the *warehoused* fibers were required to meet "immediate current needs", he made the statement on the basis of a Record which stated baldly and without contradiction that "a minimum working inventory" was all that was maintained in storage and in the face of Ohio's argument in its brief that maintenance of such minimum working inventory constituted actual use of the imported goods held in inventory.

Is it not clear that Chief Justice Stone did no more than reject Ohio's argument, which was the interpretation placed upon his remarks by the three dissenting justices of the

Wisconsin Supreme Court?* Is it not also clear that a majority of the Wisconsin court, on the Record that was before this Court in the *Hooven* case, would have held 100% of the fibers stored by the Hooven Company in its warehouse to be subject to state taxation? Nevertheless this Court held that *none* of such fibers was subject to state taxation.

The dissenting opinion in the *Hooven* case.

The error of the Wisconsin court becomes even more manifest when Mr. Justice Black's dissenting opinion in the *Hooven* case is considered. That dissent argued broadly that goods "held for use" by an importer-manufacturer were subject to state taxation. It did not argue that any part of the imported fibers constituted a minimum working inventory and were, therefore, subject to state taxation, because (1) they were "so essential to current manufacturing requirements"; or (2) they were "required to meet immediate current needs"; or (3) they were "required to be kept on hand to meet the current operational needs" of a manufacturing enterprise. Why did not the dissenters take advantage of the apparent reservation in Chief Justice Stone's majority opinion so eagerly seized upon by the Wisconsin courts? The question answers itself. It is because the dissent understood fully the meaning of Chief Justice Stone's remarks to be only that he rejected Ohio's argument with reference to the imported fibers which had not yet been withdrawn from storage in the warehouse and thus had not yet moved from "raw material inventory" to "work in process".

---

*The dissenting opinion in the Wisconsin case stated: "I cannot agree with the majority of our court that the form of the rejection of the [Ohio] argument [in the *Hooven* case] changed the established law. The decision in fact, *refused* to change it." *United States Plywood Corp.* v. *City of Algoma*, 2 Wis. 2d 567, 583, 87 N. W. 2d 481, 489 (1958).

If this Court should accept in Case No. 44 the Wisconsin court's interpretation of Chief Justice Stone's remarks, the immunity from state taxation of goods imported for use, as affirmed by this Court in the *Hooven* case, would disappear. If the rule of the *Hooven* case only applies to that portion of an inventory in excess of the needs of the business it would not make sense, and there would not be very many situations to which it could apply. As Mr. Martin stated in his testimony before the Ohio Board of Tax Appeals in the *Hooven* case: "We attempt to run our business with a minimum working inventory, *of course.*"

If the decision of the Wisconsin court were to be sustained, this Court would be faced with the argument that no importer-manufacturer maintains an inventory of raw materials larger than is required for his "current operational needs", and, shortly thereafter, with the argument that importers of goods for sale also have their "current operational needs". The constitutional prohibition against state taxation on imports would soon slide away into a musty corner of constitutional history. But the vigorous defense of the Import-Export Clause of the Constitution in *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69 (1946), cannot be so easily forgotten or ignored.

CONCLUSION

For 130 years this Court has not permitted the taxing authorities of the states to erode the prohibition of the Import-Export Clause. Why should iron ores, or veneers, or crude oil, or bauxite, or any other raw materials normally imported and stored prior to their use in manufacturing be subject, prior to such use, to state taxation without the consent of the Congress? There is no logical reason for any such denial. Certainly, the importance of exclusive Federal jurisdiction over taxation of imports is greatest today with respect to raw material imports.

There is no sanction in the Constitution or in any decision of this Court for distinctions between various classes of imports in the application of the Import-Export Clause.

The *Hooven* case holds that the tests are the same in the case of imports held for sale and imports held for use. Neither class is subject to state taxation, so long as the particular imports retain their status as such.

Each in its own way the courts of Ohio and Wisconsin have sought by artful distinctions to chop away at the *Hooven* case. But under *Brown* v. *Maryland* and "all its progeny", the iron ores imported by the steel company in Case No. 9 and stored in its storage yard, and the veneers imported by the plywood company in Case No. 44 and stored in its warehouses have retained their import status. To permit such decisions to stand will, as a practical matter, permit the 48 states to follow their own several taxing policies in a field where exclusive Federal jurisdiction is of great importance.

THE TIME HAS COME FOR THIS COURT ONCE AGAIN TO AFFIRM THE ESTABLISHED RULE.

Respectfully submitted,

BRUCE BROMLEY
ROSWELL MAGILL
Amici Curiae

CRAVATH, SWAINE & MOORE
Of Counsel

APPENDIX A

NEW JERSEY SUPREME COURT

MEXICAN PETROLEUM CORPORATION,
Prosecutor,
v.
THE BOROUGH OF ROOSEVELT, *et al,*
Respondents.
On Certiorari

Argued June Term 1919 before Justices Bergen and Kalisch.

McCARTER & ENGLISH, for prosecutor.

JOHN P. KIRKPATRICK and PETER F. DALY, for respondent.

Per Curiam.

The borough of Roosevelt assessed as the property of the prosecutor, a tug and three barges at a valuation of $130,000 and a quantity of oil in storage at $56,409.96. The prosecutor appealed to the Middlesex county board of taxation which affirmed the assessment, and thereupon this writ was allowed. It is admitted that the tug and barges were improperly assessed, and as to them the assessment should be set aside. The only question in dispute is that relating to the oil. The facts are these. The prosecutor imports the oil from Mexico and then stores it in large retainers which are located in the borough of Roosevelt. After this is done the prosecutor draws the oil and sells it to different persons. The prosecutor's contention is that the oil being an importation, is not liable to taxation, and the

only answer to this is that when the oil is pumped from the vessels in which it is imported to these tanks it then becomes mingled with the mass of other property in this state and therefore is under well settled principles, subject to taxation. It is conceded that if this oil was imported in barrels or other packages, it would not be taxable so long as the packages remained unbroken, or disposed of in such packages. We are unable to see how it can be said that the importation has lost its character simply because it is pumped into retaining tanks in this state, for so long as it remains there it is not mingled with the mass of other property. If this be not so, then the character of the retainer would permit the imposition of taxes in violation of the Federal Constitution.

The cases relating to this subject plainly indicate that something must be done by the importer to change the character of the importation before it becomes subject to taxation, and the fundamental ground upon which taxation is permitted, is that the property has become part of the mass of other property of the state, and this cannot be said occurs when a boat load of oil in bulk is moved from the ship to the warehouse for the purpose of subsequently selling it. The assessment will be set aside with costs.

Case No. 209
Opinion filed October 14, 1919.
ENOCH L. JOHNSON
CLERK

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FILED
APR 1 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] 44

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

To: The Honorable Supreme Court of the United States.

Your petitioner, United States Plywood Corporation, respectfully shows:

I.

OPINIONS OF COURTS BELOW.

The opinion of the trial court, the Circuit of Kewaunee County (R., pp. 18-45), is not reported officially but is appended to this petition in Appendix A.

The majority and minority opinions of the Supreme Court of Wisconsin (R., pp. 66-83) are reported in 2 Wis. 2d 567, ... N. W. 2d ..... and are appended to this petition in Appendix B.

II.

JURISDICTION.

1. The judgment to be reviewed is that of the Supreme Court of Wisconsin dated and entered January 7, 1958, and appended to this petition in Appendix C.

2. The statutory provision believed to sustain the jurisdiction of the Supreme Court is 28 U. S. C. § 1257(c).

III.

QUESTION PRESENTED.

Is the levy of a general *ad valorem* tax by a state upon lumber and veneer imported by and stored in the taxpayer's storage yard and warehouse in the original form and packages in which they were imported prohibited by Article I, Section 10, Clause 2 of the United States Constitution?

IV.

CONSTITUTIONAL PROVISION INVOLVED.

The Constitutional provision involved is Article I, Section 10, Clause 2 which is as follows:

> "No state shall, without the consent of the Congress lay any imports or duties on imports or exports except what may be absolutely necessary for executing its inspection laws. * * *"

V.

STATEMENT OF THE CASE.

This is a proceeding to review a judgment of the Wisconsin Supreme Court affirming a judgment which denied petitioner's claim for refund of a general *ad valorem* property tax paid under protest, assessed upon imported goods

stored by the petitioner-importer in the original packages or form in which imported.

United States Plywood Corporation, the petitioner, conducts a manufacturing business in Algoma, Wisconsin, under the name of its Algoma Plywood and Veneer Company division. On May 1, 1955, the assessment date of the general *ad valorem* tax, it used both foreign and domestic veneers and lumber in its manufacturing operations (R., p. 43). Petitioner is not contesting the impositions of the tax on imported lumber and veneer which had entered the manufacturing process and had thus lost their status as an import. On May 1, 1955, petitioner also stored imported lumber and veneer in its warehouse and storage yard. It is the imposition of the tax on these imports which the petitioner has contested.

Foreign veneers were imported by the petitioner from Canada, France and the Belgian Congo. The foreign veneers were received in Algoma in the original packages in which they were shipped. They were kept in such packages, segregated and stored in petitioner's warehouse until used in the manufacture of plywood products (Finding No. 4, R., p. 43).

Foreign lumber was imported by petitioner from Ontario, Canada. The lumber was imported in rough, unplaned form. It was shipped uncrated on railroad cars. The lumber, when received, was piled in the petitioner's storage yard. Both foreign and domestic lumber must be kiln dried by the petitioner before manufacture. The imported lumber air dried while in storage to varying degrees depending upon how long it remained in storage. Air drying reduced the time required for kiln drying (Finding No. 5, R., pp. 43, 44).

There was no co-mingling of foreign and domestic veneers or foreign and domestic lumbers so as to cause a loss of identity (R., p. 27). On May 1, 1955, petitioner had on

hand imported lumber and veneer valued at $288,593.00. The Circuit Court of Kewaunee County found that one-half of the foreign lumber and veneer, a value of $144,296.26, was required to be on hand to meet petitioner's current operational needs as a manufacturer (Finding No. 9, R., p. 44).

Petitioner seeks review of that portion of the judgment of the Circuit Court for Kewaunee County, affirmed by the Wisconsin Supreme Court, which denied recovery of $2,677.46 paid by petitioner under protest with respect to imported lumber and veneer.

Petitioner contended that the imported lumber and veneer were immune from general *ad valorem* taxation under Article I, Section 10, Clause 2 of the United States Constitution at every stage of the proceedings, originally in the protest of the assessment before the Board of Review of the City of Algoma (R., p. 9), then in the Circuit Court action for refund (R., pp. 4, 5) and thereafter by appeal to the Wisconsin Supreme Court (R., p. 56). The constitutional issue was discussed in the major portion of the Circuit Court's opinion (R., pp. 18 through 30) and the entire opinion of the Wisconsin Supreme Court (R., pp. 66-83).

VI.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(a) The Wisconsin Supreme Court has decided a federal question of substance in a manner in conflict with applicable decisions of this court.

From this Court's decision in *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678 (1867), and *Low* v. *Austin*, 13 Wall. 29, 20 L. Ed. 517 (1872), to the most recent case of *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870 (1945), imports have been held immune from state general

taxation, losing the immunity only when subjected to a manufacturing process or when removed from the original package or changed from the form of importation. The Wisconsin Supreme Court has now overruled this court's decision in the *Hooven & Allison Co.* v. *Evatt* case by declaring imports taxable if required for a manufacturer's current operational needs, even though the imports are stored by the importer-manufacturer in a warehouse and storage yard in the original package or form of importation. The three justices dissenting in the case at bar noted that the majority decision was contrary to the *Hooven & Allison Co.* v. *Evatt* decision of this court. Petitioner submits that no state court may change the law interpreting the United States Constitution as declared by this court.

(b) The Wisconsin Supreme Court has decided a federal question of substance in a manner directly contrary to decisions of other state supreme courts on the same question.

The Ohio Supreme Court in *Gardner-Richardson* v. *Evatt*, 145 Ohio St. 363, 61 N. E. 2d 704 (1945), held that a manufacturer's imports, stored in the manufacturer's warehouse for future use, were not subject to general state taxation because of the constitutional immunity provision as interpreted by this court in *Hooven & Allison Co.* v. *Evatt*, *supra*.

Imports of the same character were constitutionally protected from general state taxation by the Washington Supreme Court in *Washington Chocolate Co.* v. *King County*, 21 Wash. 2d 630, 152 P. 2nd 981 (1944), cert. den. 324 U. S. 880. The Missouri Supreme Court also decided imports stored awaiting use are immune from tax. *American Mfg. Co.* v. *City of St. Louis*, 238 Mo. 267, 142 S. W. 297 (1911).

(c) The question presented is of national concern. If any doubts exist concerning the immunity of imports needed for a manufacturer's current operations, such doubts should be resolved by this court.

Many manufacturers and businesses store imports for future use. All but three states have general tangible personal property taxes. Very few states have attempted to tax imported goods while they remain the property of the importer and are stored in the original form or package in which they were received.

Decisions of state courts which recognize the immunity of imports stored awaiting use have been allowed to stand, as a practical matter, by this Court's denial of Certiorari in these cases. Immunity of imports from state taxation also resulted from the *Hooven & Allison* v. *Evatt* decision. Language in the *Hooven* case, however, seems to have created a question as to whether states may tax a manufacturer's "current operational needs", as an exception to the original package doctrine. The Wisconsin majority in the case at bar relies on a "current operational needs" exception. The Wisconsin minority takes the position that a "current operational needs" exception was considered and rejected by this court. Doubt exists in this tax area and should be resolved by this court.

By interposing a "current operational needs" exception to the long established "original package or form" doctrine, the Wisconsin Supreme Court has affected the operations of a large number of manufacturers and businesses in the United States. Manufacturers import goods with the intention of using these goods in the future. If such imports are subject to state taxation by reason of such intention or the likelihood of such future use, the constitutional provision granting immunity is emasculated and nullified. The theory of the exception made by the Wisconsin Court will subject to tax virtually all imports since few, if any, manufacturers will store or keep any imports not intended to be used in the near or immediate future.

Taxing authorities no doubt have relied on this court's *Hooven & Allison* v. *Evatt* decision, as well as the other

state court decisions noted above, in the administration of their property tax laws. A review by this court will clarify a now uncertain tax area. Clarification would save taxing agencies the expense of litigation if these agencies now seek to tax imports as a result of the Wisconsin Court's decision.

Duties on imports are an important source of Federal revenue. Duties paid to the federal government purchase an immunity from state taxation, *Brown* v. *Maryland, supra.* Permitting the states to tax the goods subjects them to double taxation, discriminates against imported goods and discourages that wider world trade essential to implement this nation's foreign relationships. Unless the doctrine of *Brown* v. *Maryland, supra,* which has been consistently followed for 160 years is preserved, the Constitutional pre-emption of the field of taxation of imports will be surrendered to the states. An important instrumentality of national policy available to the federal government thus will be eroded by state taxation.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated March 21, 1958.

Respectfully submitted,

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APPENDIX A.

Decision of Circuit Court of Kewaunee County, Wisconsin.

(Formal Parts Omitted.)

Memorandum Decision.

Plaintiff owns and operates as one of its divisions a plywood and veneer plant in the city of Algoma. It paid its real and personal property taxes for the year 1955 under protest and brings this action against the city under sec. 74.73 to recover the portions of such taxes claimed to have been illegally exacted. The action involves questions of exemptions of imports and excessive valuations. There is also involved a question of duplication of taxes.

(a) Imported Veneers and Lumber.

In the manufacture of its veneered products the plaintiff uses both domestic and foreign lumber and veneers. The latter is directly imported by plaintiff as importer from Canada, France and the Belgian Congo. From Canada comes birch veneer, from France, French oak veneer, and from Africa, species of veneer known as korina and fuma. The veneers, both foreign and domestic, are shipped to plaintiff in bundles or wooden crates,—mostly the former. The bundles are secured by metal straps, and they, like the crates undoubtedly meet all the requirements of an "original package", as that term is used in the cases when taxability of imports by a state depends upon whether the goods are in the original package in which they were imported. The foreign lumber is imported by plaintiff directly from Ontario, Canada. The species are

birch and cedar. The lumber is used as core material. When received, it is piled in plaintiff's yard. It is claimed that each individual piece of lumber in a pile constituted an original package. The foreign veneers are kept stored in a warehouse until needed in manufacture, and, when needed, the packages are broken, and the individual pieces then commence their journey through the plant to become part of a veneered product.

Plaintiff reported as personal property subject to the state's ad valorem personal property tax all foreign veneers that had been taken from original packages on May 1st, 1955, and all foreign lumber that had been taken from piles in the yard to be run through the plant, but claimed, and still claims, that all imported veneers in its warehouse that remained in unbroken original packages and all imported lumber that remained in piles in its yard were immune from taxation under clause 2 of sec. 10 of Art. I of the Federal Constitution, which, so far as here material, provides:

> "No state shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports except what may be absolutely necessary for executing its inspection Laws * * * "

The asserted immunity is based upon *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678, and *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 65 S. Ct. 870, 89 L. ed. 1252.

In the last mentioned case (hereinafter referred to as the *Hooven* case) the taxpayer was a manufacturer of cordage and other similar products in which it used foreign hemp, which it imported in bales. The question before the court was the taxability of the hemp while remaining in bales in the taxpayer's warehouse and awaiting use. Such hemp was regarded as being in original packages and non-taxable. The *Hooven* case would be dispositive, in plaintiff's favor, of the question of the taxability of any part of the

foreign veneers remaining in the warehouse in their original packages (and likewise dispositive of taxability of lumber if it be assumed both that each individual piece of lumber constituted an original package and that the lumber did not enter the manufacturing process until taken from piles and run through the plant) were it not for the following language of the court:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence, we have no occasion to consider that question." (89 L. ed. 1264.)

Acting, no doubt, under the authority of an opinion of the Attorney General rendered November 10th, 1949 (38 A. O. G. 563), which is to the effect that the *Hooven* case did not close the door to taxation of that part of a manufacturer's stock of imported raw materials essential to current manufacturing operations notwithstanding that such materials on hand May 1st remained in their original packages, the assessor taxed against the petitioner the value of one-half of the imported veneers then in the taxpayer's warehouse in original packages and imported lumber in piles, being of the opinion that one-half of such

stock on hand was needed to meet current operational requirements.

As I understand one of the arguments of the taxpayer, it is to the effect that other portions of the majority opinion in the *Hooven* case, by necessary implication, dispel the notion that the supreme court intended to leave open the question of whether raw materials on hand in original packages but needed by a manufacturer-taxpayer to meet his current manufacturing requirements is subject to an ad valorem personal property tax notwithstanding that the manufacturer is the importer. I consider, however, that the express reservation of the question contained in the language above quoted outweighs any implications to the contrary and requires the conclusion that the question with which we are now concerned remains open. I do not find in *Gardner-Richardson* v. *Evatt* (1946), 145 O. 363, 61 N. E. 2d 704, any consideration of the question whether such portion of a manufacturer's raw materials as was needed for current operational requirements was subject to tax nor any holding that such portion was not taxable. That point does not appear to have been considered.

In the *Hooven* case the court, before reserving the question above indicated, in part said:

> "It is evident, too, that if the tax immunity of imports, commanded by the Constitution, is to be reconciled with the right of the states to tax goods after their importation has become complete and they have become a part of the common mass of property within a state, 'there must be a point of time when the prohibition ceases, and the power of the state to tax commences.' *Brown* v. *Maryland, supra* (12 Wheat. (U. S.) 441, 6 L. ed. 686)." (89 L. ed. 1259.)
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> "The constitutional necessity that the immunity, if it is to be preserved at all, survive the landing of the merchandise in the United States and continue until a point is reached, capable of practical determination,

when it can fairly be said that it has become a part of the mass of taxable property within a state, is the same in both cases." (89 L. ed. 1264.)

There is nothing sacrosanct in the original package rule. Goods which come into this country on purchase by one engaged in the importing business and which are in turn sold in their original packages to a domestic manufacturer-user lose their constitutional immunity from state taxation as imports the moment the sale is made by the importer to the manufacturer. They then become taxable to the manufacturer as in the case of other property. *Waring* v. *Mobile*, 8 Wall. (U. S.) 110, 19 L. ed. 342.

The taxpayer sees in any departure from the original package rule,—that is to say, the rule that the immunity of contents of an original package from state taxation continues until the package is broken,—in the instant situation future problems involving tests which will be much more difficult of application than the original package test and which, it is claimed, will result in such lack of uniformity and confusion as to require adherence to a rule that all imports in original packages continue to enjoy immunity until the package is broken. I do not consider that any such difficulties provide sound and sufficient reasons for exempting a manufacturer from the state's personal property tax on that portion of his imported raw materials which he has himself imported and which remain in their original packages to the extent that such goods are needed to meet current operational needs. Lack of an infallibly accurate test does not argue against a power to tax. In this connection the dissenting opinion of Justice Black in the *Hooven* case should be considered.

If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so

definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's ad valorem personal property tax.

By what criterion should a manufacturer's current or immediate need of a certain raw material be determined? In this connection the characteristics of Wisconsin's ad valorem personal property tax require further consideration. It is, first of all, a tax that is not a levy in lien form against property but a tax assessed against the owner of the property. It is assessed as of May 1st. The taxpayer is not liable for tax on property that he may own the day before May 1st but does not own on the latter date; nor may he avoid the tax on property which he owns on May 1st but disposes of on May 2nd. The May 1st circumstances are those that control.

I think that an importer-user of foreign raw materials may be subjected to the Wisconsin personal property tax on such part of such materials remaining in original packages as he has on hand May 1st and which he will be required to have on hand in the immediate future to meet his manufacturing needs for the period that would normally be required for him to secure additions to the inventory if he placed his order on May 1st, assuming the conduct of his business in the usual and normal manner. To illustrate: Assume a Wisconsin daily newspaper company that buys its newsprint from Canada. Its presses use 5 jumbo rolls of newsprint per day, each roll constituting

an original package. Assume also that an order for newsprint requires 20 days for delivery. Assume further that the company customarily keeps on hand about 300 jumbo rolls and that it has on hand May 1st exactly 300 rolls. It would thus appear that the presence of at least 100 rolls in the warehouse was indispensable to continuous publication of the newspaper unless purchases were made from a nearby domestic owner, in which case the newsprint so purchased would not enjoy the immunity, because of the doctrine that a sale by a domestic importer puts an end to the immunity as an import. *Waring* v. *Mobile, supra.* I do not believe that the intent of the *Brown* and *Hooven* cases would prevent Wisconsin from assessing its personal property tax against 100 rolls of newsprint on hand May 1st. The situation as it existed on that day was that the company could not, short of 20 days, import additional newsprint, and unless it had a 20-day supply on hand there could be no continuous publication of the newspaper with newsprint imported by the newspaper company from Canada. While of the 300 rolls on hand 200 could be regarded as surplus stock, certainly 100 rolls constituted the minimum requirement of current needs and should be regarded as being so irrevocably appropriated to use by the newspaper company as to have entered the process of publishing a local newspaper. I do not consider that the fact that orders placed before May 1st may have assured delivery of further newsprint before May 20th argues against the validity of the suggested criterion in the application of Wisconsin's *May 1st* personal property tax.

There are, of course, other criteria that may reasonably be used to determine in a practical manner what raw materials a manufacturer must have on hand to assure continuous operations. Counsel for the city has in this case suggested a "manufacturing cycle" test, and it may be that that test is better than the one indicated above. The

"manufacturing cycle" test amply supports the conclusion of the assessor that one-half of the foreign imports on hand May 1st were required to be on hand to meet plaintiff's immediate needs.

In its report of taxable personal property, submitted by the taxpayer pursuant to sec. 70.35 (1) on June 7th, 1955, the following statement appears (Exhibit 8, page 4):

"Non-assessable Raw Materials (Note A) $288,593."

* * * * *

"(Note A) Non-assessable Raw Materials consist of veneers and lumber, which are imported into the United States from Africa, Canada, and France upon which import duties have been paid to the Customs Department of the United States Treasury. These raw materials are stored in our raw material storage depot on May 1, 1955, in their original crates, cartons, bindings, etc., as such were received from Foreign countries at Ports of Entry."

Without attempting to draw any fine distinction between the lumber and veneers, the assessor determined that one-half the total, or $144,296.26, was taxable because needed to meet current operational requirements. The assessor reached his conclusion after study, inspection and observation of plaintiff's business and methods. Analysis of Exhibit 36, which shows how long the foreign veneers and lumber would have lasted had such raw materials on hand May 1st been used to fill orders rather than any subsequently received materials, sufficiently proves that the taxpayer had on hand not less than $144,296.26 in value of foreign veneers and lumber which were required to be on hand to meet current operational requirements. I do not think that the Federal Constitution requires that the assessor make separate determinations as to each separate class or specie of imports so long as the overall result remains within the value of total imports that have lost their character as such for purposes of an ad valorem state

tax assessed against the owner. If the criterion suggested by the Court is a proper one, it may be claimed that the evidence lacks proof as to how long it would take to obtain a shipment of some of the imports. The burden of proof in this respect becomes important, but even though it rested with the city, Mr. Kambach's testimony as to the time it takes to obtain a shipment of French or African veneer, together with reasonable probabilities as to the time it takes to secure shipments of other imports, leaves the assessor's determination that imports to the value of $144,296.26 as being assessable against plaintiff fair and reasonable to the company.

What has been said assumes the taxability of lumber to be limited to operational needs as in the case of veneers. That was the assessor's view. But I think in such respect he was in error in not regarding a larger portion than one-half of the foreign lumber as being taxable. The taxpayer did not set aside any particular part of its lumber storage yard or veneer warehouse for the storage of foreign materials. Veneers were piled separately according to specie, without regard to whether the adjacent pile was of foreign or domestic origin and without regard to the time of receipt. A portion of a new shipment of fuma veneer, for instance, would be placed on a partially depleted pile of that veneer and could be the first next taken for use. It is not considered, however, that there was such commingling of foreign and domestic veneers or foreign and domestic lumber as to cause a loss of identity.

Most of the foreign lumber when received was "green". Apparently most of the domestic lumber was purchased green also. All lumber when received was piled in a manner to facilitate air drying. While the method of piling adopted was intended also to prevent decay, it cannot be said that this was the dominant purpose. It appears that air drying never sufficiently removes the moisture content

of lumber to permit its use by plaintiff without running the lumber through the dry kilns. It also appears that green lumber is not generally run through the dry kilns without a period of air drying and that it is not "good business practice" so to do. It is the normal procedure or practice that should and does control, and I think, at least as to the lumber received green—which accounts for most of the Canadian lumber—that when it was received and piled, the dominant purpose was to prepare it for use by air drying, thus by a slower but more economical process accomplishing in part what kiln drying would accomplish.

There is no evidence as to the proportion of Canadian lumber that was on hand that was received green except that most of it was. If it be claimed that lumber already partially air dried but sufficiently dry to be run through the dry kilns as a matter of good business practice was not subjected on piling to the processes of manufacture, I think that, conceding the validity of such claim, it, nevertheless, becomes clear that green lumber on receipt and piling entered the "process of manufacture" and lost immunity as an import. In the *Hooven* case the court said:

> "This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state taxation when they are subjected to the manufacture for which they were imported." (89 L. ed. 1264.)

The assessor would have been warranted in taxing all of the green Canadian lumber. When received by the taxpayer it was not ready for use if good business practices were followed by the taxpayer. When the company received the lumber it immediately proceeded to make it ready for use by subjecting it to the air drying. Such air drying was part of its manufacturing practices.

A further question has been raised in connection with

imports, and that is whether each individual piece of lumber constituted an original package. This lumber comes in rough form, that is, unplaned. It is 2 inches thick, of standard lengths and of standard widths, such as 4 inches or 6 inches. Counsel for the taxpayer cites the case of *Dant & Russell, Inc.* v. *Board of Supervisors of Los Angeles County* (Cal. App. 1942), 128 P. 2d 389, as authoritatively deciding that each individual piece of lumber in a shipment received by the taxpayer from Canada was an original package. Language in the opinion in that case is to such effect. The supreme court of California, however, reversed the decision (133 P. 2d 817 (1943)). While the reversal was on other grounds, the same appellate court that rendered the decision, later declared that the effect of the supreme court's decision was to "black out" and leave without any "authoritative value or standing" the determination that each piece of lumber was an original package and came to the opposite conclusion. *E. J. Stanton & Sons* v. *Los Angeles County* (1947), 78 Cal. App. 2d 181, 177 P. 2d 804. In the last mentioned case it appears that Stanton was engaged in the wholesale and retail lumber business. He imported lumber which, as in the instant case, was shipped loose,—that is, not bundled or fastened together in any other way. He was taxed on the portion of the shipment that remained after sales had been made from such shipment. The tax was upheld. The supreme court of California refused a hearing, and the United States supreme court denied certiorari. 332 U. S. 766, 68 S. Ct. 75, 92 L. ed. 352. See *Simon* v. *City of Los Angeles* (Cal. App. April 24th, 1956), 296 P. 2d 381, where the court gives effect to the decision in the *Stanton* case as follows:

> "The power of the county to tax was thus upheld upon the theory that the 'aggregation of articles imported' constituted in legal concept an original package which was broken when some of the parts of the 'aggregation' were sold locally. The case undoubtedly repre-

> sents the law applicable to a situation where packaging is inherently impossible or impracticable. Our Supreme Court refused a hearing and the United States Supreme Court denied certiorari. 332 U. S. 766, 68 S. Ct. 75, 92 L. ed. 352. But the *Stanton* case does not control imports which actually are in packages. In such instances the question is what is the original form or package."

The evidence here was not directed to the ascertainment of whether the foreign lumber on hand May 1st consisted of broken or unbroken shipments. Such determination is unimportant to the sustainability of the assessment upon the grounds assigned by the assessor.

(b) *Excessive Valuation of Real and Personal Property.*

Plaintiff operates a large industrial plant in a small city. Its real estate consists of two plants, known as the Perry Street Plant and the Navarino Street Plant. In addition to the lands which are used industrially plaintiff owns three residences and three vacant residence lots. The latter six parcels of real estate were separately assessed in the manner usual in such cases (Exhibits 13 to 18). No complaint is made of these assessments. The complaint goes to the valuation of the industrial lands and buildings and certain items of personal property.

Plaintiff's right to question the taxation of imports does not necessarily rest on sec. 74.73, but its right to a refund based upon "allegedly excessive assessments", whether of real or personal property, does. Counsel for the city calls attention to sec. 74.73 (2), which in part provides that

> "No claim shall be allowed and no action shall be maintained under the provisions of this section unless it shall appear that the plaintiff has paid more than his equitable share of such taxes."

and to *Krom* v. *Antigo*, 220 Wis. 542, *Highlander* v. *Dodge*-

ville, 249 Wis. 502, and *Yawkey-Bissell Corp.* v. *Langlade*, 261 Wis. 524, which deal with plaintiff's burden in establishing that he "has paid more than his equitable share of such taxes", and urges the Court to dispose of the claims of excessive assessments for reasons set forth in his brief as follows:

> "It is defendant's position that *Highlander* v. *Dodgeville, supra*, rules the case at bar and that plaintiff has not offered evidence sufficient to cause the Court to act in weighing the evidence. Even if the assessment has been in an amount three times the fair market value of plaintiff's property, plaintiff could not have recovered unless it proved that the rest, or a substantial part of the rest, of the property in Algoma had been assessed on a different basis, such as only twice its fair market value. The burden of proof is on the plaintiff, and the presumption exists in favor of the correctness of the assessment. Under the *Krom* and *Highlander* cases, *supra*, plaintiff has offered insufficient evidence, and there is nothing to be considered by the court except the constitutional question.
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> "In *Yawkey-Bissell Corp.* v. *Langlade*, 261 Wis. 524, 53 N. W. 2d 174 (1952), the taxpayer recovered for the reason that since 'the cutover lands in question were illegally assessed in 1948 at more than their full value, and no other property in the township was assessed at more than one-half of such value, such assessment of such lands was clearly illegal.' (page 527) This holding is a confirmation of the rule in *Highlander* v. *Dodgeville, supra*, and a practical application of that rule in setting up the requirements which a taxpayer must fulfill in order to recover. Plaintiff in the case at bar has not met those requirements.
>
> "Assuming, as claimed by plaintiff, that the lands, the buildings, the logs and the repairs and maintenance parts of plaintiff were overassessed, and that there was a duplication of assessment in respect to machinery and furniture and fixtures, plaintiff has nevertheless, made insufficient showing to entitle it to recover. Since plaintiff failed to offer any testimony as to the

value of the other real estate owned by it in Algoma and described in plaintiff's exhibits 13, 14, 15, 16, 17 and 18, plaintiff has failed to show that its property, taken as a whole, was assessed at more than its full market value, and that its property, taken as a whole, was assessed on a disproportionately higher basis than the rest of the taxable property in Algoma. The burden of proof is on the plaintiff, and plaintiff did not even offer evidence to prove that its property, taken as a whole, was assessed on a disproportionately higher basis than the rest of the taxable property."

The city's position is that by simply proving an assessment for more than market value a taxpayer does not make out a case for a refund. Plaintiff must go further, it is argued, and establish by evidence other than the testimony of the assessor that at least a substantial portion of other property in the taxing district is not assessed for more than market value. Merit in the argument is to be found in the probability that there has not yet been born an assessor who would admit on the witness stand that his purpose was to assess all property at 100% or 60% of true market value, as the case may be, but as to plaintiff be assessed at a higher percentage. Hence, a rule that would permit a taxpayer to recover a refund based upon an excess over a percentage assessment, which the assessor will always claim he applied to all similar property, upon mere proof that in plaintiff's case the assessor did not follow his rule, would, as a practical matter, permit plaintiff to make out a case under the statute without proving that the same injustice or error which infects his assessment does not also infect the assessment of at least a substantial portion of the taxpayers in his district.

The city's contention that the plaintiff failed to prove that its residence lots and property were not assessed at less than full market value requires dismissal of the plaintiff's claims to an over-assessment of other of its property

involves a question which would deserve serious consideration in the case of a taxpayer who owns two pieces of property—say, a merchant who owns a downtown store and also his residence—and in protesting the assessment of the store proves only its over-valuation without at the same time proving that there has been no under-valuation of his home or the stock of merchandise in his store, on the theory that he stands before the court asking an equitable accounting of his taxes due his city and that he should not be permitted to recover any amount unless his aggregate tax bill is too high. While the equitable considerations in such a situation are apparent, they need receive no more attention here, because it is obvious that no conceivably reasonable claim of under-valuation of plaintiff's residence property could offset an over-valuation of plaintiff's industrial property by an amount that would leave a net over-assessment so small, under plaintiff's theory of values, as not to deserve consideration under the rule of the *Krom* and *Highlander* cases.

Acts passed by the 1953 and 1955 legislatures here require consideration. The 1953 legislature added subsec. (4) to sec. 74.73, thereby denying to a taxpayer the right to maintain a plenary action, such as the instant one, to recover as a refund the portion of his taxes which he established constituted an unjust share under the decisions of our supreme court and thus relegated him to certiorari proceedings under sec. 70.47 (9) (a) or to invoking the remedy before the department of taxation provided for by sec. 70.85.

The legislature, by Chapter 111 of the Laws of 1955, which became effective May 11th, 1955, changed sec. 70.49 (2) to read as follows:

> "The value of all real and personal property entered into the assessment roll to which such affidavit is attached by the assessor shall, in all actions and pro-

ceedings involving such values, *be presumptive evidence that all such properties have been justly and equitably assessed in proper relationship to each other.*"

Previously the statute made the values appearing on the roll "*presumptive evidence of the full market value*" of the property only.

The same legislature, by Chapter 440 of the Laws of 1955, effective July 26th, 1955, repealed and recreated subsec. (4) of sec. 74.73 so as to again permit suit to be brought to obtain a refund of taxes on account of an excessive assessment. It is clear that the act which restored the cause of action did not dispense with or change any of the requisites of a cause of action under the statute, as established by prior decisions, and is, therefore, not here important.

Counsel for plaintiff does not contend that the change in sec. 70.49 (2) does not broaden and give more scope to the presumption accorded an assessment but does contend that it is inapplicable here because the new statute was not passed until May 11th, 1955. With this contention I disagree. The amendment merely changed a rule of evidence and did not affect any vested right. The change in the rule *did not operate to* give to an assessment a conclusive effect as distinguished from a presumptive effect. The present statute has application to this action, which was commenced long after the statute took effect. *Estate of Sletto,* 224 Wis. 178, 181; *Will of McNaughton,* 138 Wis. 179, 189; *Flanders* v. *Town of Merrimack,* 48 Wis. 567, 570. The assessment in the instant case actually was made after May 11th, 1955, while under sec. 70.10 assessments are required to be made as of the close of May 1st, they need not be completed before the first Monday in July. Taxpayer's personal property statement (Exhibit 8), filed in accordance with sec. 70.35, was not required to be filed

before May 25th and was not filed until long after May 11th. *Northern Supply Co.* v. *City of Milwaukee*, 255 Wis. 509, is, clearly, not controlling.

Freight on Logs. Complaint is made because the assessor, in arriving at the true cash value of certain logs on hand as part of the company's raw materials, took the figure at which the cost of the logs appeared on the company's books, which was $71,925. This cost, naturally, included the freight paid by the company. It appears that these logs are usually bought from places in northern Wisconsin and Minnesota, and that the logs were purchased F. O. B. the landing point or point of origin. Based upon testimony of Mr. Kambach that on a single occasion, and for reasons that do not appear, some logs were sold to a veneer plant in Menasha, the company assuming the freight, it is claimed that if plaintiff should not use its logs but should sell them instead, it would have to bear the freight, and, therefore, in computing the true cash value, freight which the plaintiff paid should be excluded. Naturally, if plaintiff purchased logs from a certain point in northern Minnesota, paying the freight, and later sold some of such logs to a plant in Menasha, the Menasha buyer would not pay more than it would cost him to get the logs from northern Minnesota, and no doubt the freight to Menasha would not be more than to Algoma. This testimony falls far short of proving that the assessor erred in assessing the logs for $71,925, which was the cost of the logs to the company as shown on the company's books. I perceive no merit in plaintiff's contention. I think it can be safely said that, normally, any manufacturer deciding to sell off part of his raw materials rather than using them would have difficulty in realizing cost. As to other items of raw materials into which freight enters as a part of cost, no complaint is made that injustice is done by taking cost per the company's books as being the true cash value.

Repair and Maintenance Parts. The assessor added to plaintiff's personal property the company's repair and maintenance parts, which were carried on the books in the amount of $71,360 as prepaid expense, such figure representing cost, but which had not been returned as assessable property. He valued this property at cost. While it is argued that this property should not be valued at cost, plaintiff offered no proof of value whatever, and there is nothing in the record in the way of proof that establishes that cost to plaintiff was not true cash value. Mere claim that an assessed value is too high falls far short of establishing a cause of action for a refund. See the *Krom* and *Highlander* cases, *supra.*

Industrial Lands and Buildings. Plaintiff claims that the assessed valuation of industrial buildings should be reduced from $1,297,066 to $586,000, under the proofs made, and the lands reduced from $101,840 to $16,485, and a refund of taxes ordered accordingly. The over-all assessment problem which plaintiff's properties create is self-evident. Plaintiff was dissatisfied with the 1954 assessment and filed a petition with the tax commission for a reassessment. Instead of ordering reassessment, the tax commission directed a supervised assessment to be made, pursuant to the statutes, in the year 1955, and to this method of procedure plaintiff did not object. The commission appointed J. D. Semrad to supervise the assessment. Plaintiff protested its assessments before the board of review, and the board confirmed the assessments made.

At the trial plaintiff produced Kenneth Sarles as its chief expert witness. Richard Bourguignon, who assisted in preparing an appraisal, also testified in plaintiff's behalf as an expert. Both Mr. Semrad and Mr. Sarles qualified as experts, with an imposing experience background, and they differed radically as to the formula or method most reliable in determining market value of plaintiff's

plant. Comparable sales as a criterion of value of the plant were non-existent. The market value of the plant—land, buildings and fixtures—lies in theory. Market value of the buildings and fixtures independently of the land also lies in theory. The market value of bare industrial lands finds some test in the market value of neighboring lands. Conflict between these experts was to be expected. Mr. Semrad, however, does not stand before the Court as a paid expert employed by a private litigant. He was employed by the state tax commission to supervise a reassessment.

As to the value of the plants, including industrial lands, the testimony of Mr. Semrad sufficiently supports these values, and they must be sustained. *Wisconsin Malting Co. v. Manitowoc*, 225 Wis. 393. It should be noted that the basis upon which the plaintiff acquired these properties was not made to appear in evidence. Did it or did it not make its purchase on the basis of certain values being assigned to the tangible assets of the old company? While the plaintiff did not buy the assets of the old company but bought the outstanding capital stock instead, it seems reasonable to suppose that in the negotiations the market value of the physical plant received some consideration.

Duplication. The company reported (Exhibit 8) its machinery and tools constituting personal property at $98,445, and furniture, fixtures and equipment constituting personal property at $25,053. These were the depreciated values per the company's books. These values were accepted and reduced to round figures at $98,440 and $25,050, or a total of $123,490, and assessment was made accordingly. Mr. Semrad was not satisfied, however, to accept the depreciated cost figures of machinery and equipment forming part of the real estate, which was all that the company had supplied him. He called for a statement of cost as to such items, and received Exhibit 10, which lists

costs at $1,694,095.92, depreciation at $879,393, and net book value at $814,702.92. Because of the great increase in costs in recent years Semrad added 15% to costs and then reduced that figure by 30% to arrive at present cash value. No complaint is now made as to such method of valuation, nor was any proof offered tending to show that the resulting figures were too high. It developed at the trial that in furnishing Exhibit 10 the company did not exclude machinery and equipment falling within the classification of personal property, and as a result Semrad was misled and inadvertently included in the assessment of $1,363,740 for fixed machinery and equipment in the Perry Street plant (Exhibit 20) and in the Navarino plant (Exhibit 19) the above mentioned personal property already assessed at the sum of $123,490.

I think that this showing calls for a holding that plaintiff is entitled to a refund in an amount it has satisfactorily proved its taxes were increased by the error. And I think, too, that no time should be spent on the proposition that had the error not been made, it may be questionable whether the total tax bill would have been less, because I believe that had the company listed in Exhibit 10 only its machinery and equipment constituting fixtures, Mr. Semrad would have employed the same percentages that he actually used in arriving at value. The duplication was the result of an inadvertent act. It was a mistake. And I think that it is such a mistake as, under the rationale of the decision in *State ex rel Pabst B. Co.* v. *Kotecki*, 163 Wis. 101, must be remedied, even though plaintiff did not produce proof of the value of the fixed machinery and equipment forming part of the real estate after excluding the duplicated items.

Counsel for plaintiff in his computations assumes that because the company reported the depreciated value May 1st, 1955, of machinery and equipment constituting per-

sonal property as being a certain percentage of the May 1st, 1955, depreciated value of all machinery and equipment, whether personal property or forming part of the real estate (Exhibit 8), the same percentage must be used in reconstructing the cost of machinery and equipment appearing on Exhibit 10 and which the assessor used as a starting point. That, of course, cannot be done because of the different rates of depreciation that were applied to different classes of machinery and equipment. I think that the refund should be based on what here appears as a certainty. Taken as personal property, the tax assessed amounted to $123,490 × .0185553, or $2,291.39. Taken as fixtures, the exact tax assessed is not determinable. If, as fixtures, the same property was taxed at a higher sum, plaintiff has not proved the amount. If taxed at a lesser sum, the city should not be heard to say that although it collected taxes on this property as real estate it should not refund the tax it has also collected on the property as personalty because there is a failure of definite proof as to the amount of taxes resulting from the assessment as real estate. The taxpayer is entitled to a refund in the amount of $2,291.39, with interest.

In General. Except as respects the constitutionality of the tax on imports and the unintended duplication of certain items of personal property, plaintiff's complaint in general simmers down to this: that the city of Algoma has assessed its real estate at values that exceed fair market value and certain of its personal property at values that exceed true cash value. It asks the Court to remedy such situation by adopting its own experts' ideas of value as to the lands and bare buildings. In fixing the true cash value of logs it asks the Court to adopt a rule based upon an isolated experience that would appear to be contrary to common practice of manufacturers in valuing their raw material. As to repair and maintenance parts it produced

no evidence of value but yet maintains that the Court should cut the assessor's figures one-half. I think it may be fairly said that what plaintiff in effect seeks to do is to make an assessor out of the Court. In *Buildings Development Co.* v. *Milwaukee,* 225 Wis. 357, 364, the court said:

> "But property owners must, in all but plain cases of breach of statutory duty, rely on just and fair treatment by assessing authorities, rather than the courts, for avoidance of intolerable assessments. We perceive nothing in the record before us to warrant the court in interfering with the instant assessments."

Plaintiff contends that the proof establishes a cause of action under sec. 74.73 justifying if not requiring, reduction of building valuations from $1,297,066 to $586,000 and land values from $101,840 to $16,485. It is earnestly argued that reductions should be to the latter figures. Such a reduction would mean that the land assessment has been slightly more than six times market value and would convict Mr. Semrad of either an inexcusably neglectful performance of his duties or gross incompetency, although his history of employment by the tax commission to supervise assessments and the study made of values in this case and justification of values would indicate the exact contrary. Does the disparity between land value figures cast more doubt on the reliability of the testimony of plaintiff's experts than on Mr. Semrad? The presumption which the statute gives to the correctness of an assessor's figures would appear to be entitled to its strongest application when an assessment is supervised by an expert appointed by the tax commission.

We certainly do not here have such a case of injustice as was established by the proofs of *Yawkey-Bissel Co.* v. *Antigo, supra.* Mr. Bosman's testimony, essentially hearsay in character, and the evidence as to the assessment of the Algoma Lumber Company lands, and the comparison

made of their value to that of plaintiff's lands, fall far short of establishing a case for a refund within the rule of the *Highlander* case. The evidence does not warrant me in holding that the assessments are so substantially out of line with other assessments as to impose an inequitable tax burden. To grant a refund the case must be one in which the proofs warrant the court in holding, with a reasonable certainty of being right, that the taxpayer has paid a certain number of dollars too much in relation to other taxpayers. This is not such a case.

Plaintiff proposes a finding to the effect that Mr. Semrad as supervisor made the assessments without the concurrence of Mr. Graf, the city's assessor, and it is claimed that the assessment is illegal for that reason. The assessor and the supervisor acted together. Both signed the statutory affidavit attached to the assessment roll. Which of the two wrote the figures upon the assessment roll is not important.

Plaintiff is entitled to a refund on account of the duplication above dealt with, and that is all. As to costs, plaintiff is entitled, I consider, to a $100 attorney fee and clerk's fees, and that other disbursements should be limited to two days attendance on the part of Mr. Kambach as a witness. I consider that only his testimony was essential to the proof of the duplication.

Dated this 24th day of October, 1956.

By the Court,
E. M. DUQUAINE,
Circuit Judge.

Findings of Fact and Conclusions of Law.

(Formal parts omitted.)

The issues joined in this action having come on for trial before the above named court and having been tried, the plaintiff appearing by Messrs. Whyte, Hirschboeck & Minahan, and defendant appearing by Messrs. Larkin & Blum and by S. Knudson, City Attorney, and after hearing the proofs of the parties and the arguments of counsel, and being advised in the premises,

NOW, THEREFORE, I, The Hon. E. M. Duquaine, the judge before whom the same was tried, Do Decide And Find As

FINDINGS OF FACT.

1. Plaintiff is a foreign corporation, licensed to do business in the State of Wisconsin, and was the owner of land, improvements and personal property within the City of Algoma, Kewaunee County, Wisconsin, on May 1st, 1955.

2. The City of Algoma comprises a taxing district within the State of Wisconsin for the assessment of property taxes upon land, improvements and personal property.

3. The City of Algoma assessed the real and personal property of plaintiff for taxation as of May 1st, 1955. Such assessment was a supervised assessment under Wisconsin Statutes, the supervisor being Mr. J. D. Semrad. The city's assessor and said supervisor acted together in making the assessments, and both signed the statutory affidavit attached to the assessment roll. Plaintiff filed written objections to its assessments, and hearing on the same was held before the Board of Review of the City of Algoma. The Board of Review affirmed the assessments. Plaintiff paid its real and personal property taxes for the year 1955, under protest, on January 4th, 1956. The city council took no action upon plaintiff's claim for refund, and plaintiff commenced this action on April 2nd, 1956.

4. In the manufacture of its products plaintiff uses both foreign and domestic wood veneers. Foreign veneers are directly imported by plaintiff as importer from Canada, France and the Belgian Congo. Such foreign veneers are received by plaintiff at its plant in Algoma in the original packages in which they are shipped. They are kept in such packages and stored in plaintiff's warehouse until used in the manufacture of a veneered product.

5. Plaintiff also uses both foreign and domestic lumber in its manufacturing operations. Foreign lumber is directly imported by plaintiff as importer from Ontario, Canada, the species being birch and cedar. The lumber is imported in rough form, that is, unplaned. It is 2 inches thick, of standard lengths and standard widths, such as 4 inches and 6 inches. It is shipped loose in railroad cars, the sticks or individual pieces of lumber not being bundled or fastened together in any other way. Most of the foreign lumber is purchased and received "green". The lumber when received is piled in plaintiff's storage yard in such manner as to facilitate air-drying and with the dominant purpose of subjecting the lumber to air-drying before converting it into a manufactured product. Air-drying does not sufficiently remove moisture from lumber to enable plaintiff to use it in its products. Some kiln-drying is necessary to bring the lumber to the degree of dryness requisite for use by plaintiff. While green lumber may be wholly kiln-dried, it is plaintiff's practice, and also good business practice, to subject green lumber to air-drying before running the lumber through the dry kilns. That is more economical than wholly kiln-drying green lumber. Most of the foreign lumber on hand in piles in the storage yard on May 1st, 1955, was lumber which had been received in green condition, and all such green lumber was then being subjected to the manufacture for which it was imported.

6. The foreign veneers on hand in warehouse in original

packages and foreign lumber in piles in storage yard on hand May 1st, 1955, were of the value of $288,593. The assessor determined that one-half of the imported veneers and lumber were necessarily on hand to meet plaintiff's current operational needs as a manufacturer and assessed against plaintiff for personal property taxes the value of one-half of such foreign veneers and lumber, or $144,296.26. The assessor's determination was fair to the plaintiff, and it is the Court's finding that at least one-half of said foreign veneers and lumber and of the value of $144,296.26 were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer.

7. Veneer logs, which were assessed at a valuation of $75,925, were not assessed in excess of true cash value. Repair and maintenance parts, which were assessed at a valuation of $71,360, were not assessed in excess of true cash value.

8. Plaintiff's industrial real property was not assessed at more than full value which could ordinarily be obtained therefor at private sale.

9. In the valuation of $1,363,740 placed upon fixed machinery and equipment forming part of the industrial real estate there was inadvertently included by the assessor items of machinery, tools, furniture, fixtures and equipment constituting personal property separately assessed as personal property at a valuation of $123,490, and on account of which taxes in the amount of $2,291.39 were levied. No proof was adduced by plaintiff that fixed machinery and equipment, excluding the said items taxed as personalty, had a market value less than $1,363,740.

Upon the foregoing Findings of Fact I make the following:

Conclusions of Law.

1. The assessment of one-half the imported veneers and lumber on hand May 1st, 1955, at a valuation of $144,296.26 and the levy of a personal property tax thereon based on such valuation was not in violation of Article I, section 10, clause 2, of the United States Constitution.

2. Plaintiff has failed to establish a cause of action for a refund of taxes based upon real estate being assessed at more than full market value which could ordinarily be obtained therefor at private sale or personal property being assessed in excess of true cash value or based upon assessments made against plaintiff being so substantially out of line with other assessments as to impose an inequitable tax burden.

3. By reason of Finding of Fact No. 9, and notwithstanding Conclusion of Law No. 2, plaintiff is entitled to a refund of the personal property taxes in the amount of $2,291.39 assessed against the personal property of the valuation of $123,490 mentioned in Finding of Fact No. 9.

4. Plaintiff is entitled to Judgment against the defendant for the sum of $2,291.39, together with interest at 5% from January 4th, 1956, and together with costs in the amount of $100, plus clerk's fees, plus witness fees for two days attendance by Mr. Kambach.

Let Judgment be entered accordingly.

Dated this 24th day of October, 1956.

By the Court,

E. M. Duquaine,

Circuit Judge.

APPENDIX B.

Majority and Minority Opinions of Wisconsin Supreme Court.

(Caption, Case No. 120, August Term, 1957.)

Appeal from a judgment of the circuit court for Kewaunee County: E. M. Duquaine, Circuit Judge. Affirmed.

Action by a manufacturer against a city to recover taxes on personal property paid under protest. The property in controversy consisted in part of wood veneers and lumber imported from outside the United States, and the validity of the tax on such veneers and lumber was challenged on the ground that it was an "impost or duty on imports" and therefore prohibited by Art. I, Sec. 10, Clause 2 of the Constitution of the United States. The trial court sustained the validity of the tax and denied recovery thereof. Plaintiff appeals.

The trial court made comprehensive findings of fact, the adequacy and correctness of which are not challenged. For present purposes, the facts so found may be summarized as follows: Plaintiff carries on a manufacturing business in the city of Algoma. In the manufacture of its products it uses both foreign and domestic wood veneers, and both foreign and domestic lumber. It imports the foreign veneers from various nations, and they are received at its plant in Algoma in bundles secured by metal straps, or in wooden crates, such straps or crates being the original packages in which they are shipped. The veneers are kept in such packages and stored in plaintiff's warehouse until used in the manufacture of veneered products.

The foreign lumber is imported by plaintiff from Canada in rough unplaned form, in railroad cars, the individual pieces not being bundled or fastened together in any way.

Most of this lumber is "green", and must be dried before being converted into manufactured products. When received it is piled in plaintiff's storage yard in such a manner as to facilitate air-drying, and for the dominant purpose of air-drying it. Air-drying does not remove enough of the moisture, and the lumber must also be kiln-dried. While the drying might be done entirely in the kiln, it is more economical, and is good business, to air-dry it before it is run through the kiln.

On the assessment date, May 1, 1955, foreign veneers and foreign lumber thus stored in plaintiff's warehouse and storage yard had a value of $288,593. The assessor determined, and the trial court found, that one-half of the imported veneers and lumber, of the value of $144,296 were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer. The court held, in an opinion carefully analyzing the authorities, that the constitutional provision invoked by the plaintiff did not immunize the imported materials thus required for current operational needs, from the city's general property tax.

WINGERT, *J.* The question for decision is whether clause 2, of sec. 10 of Art. I of the Constitution of the United States prohibits the imposition of the city's general property tax on the veneer and lumber imported by the plaintiff from other nations, which are still in the original package or form in which imported, but which are held and needed for the manufacturer's current operational needs.

The constitutional provision is as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. * * *"

The purpose of the provision so far as it relates to imports appears to have been to prevent discrimination against imports by means of taxation, and to prevent the seaport states through whose harbors most imports then came, from taxing the imports of the other states, and thus burdening the commerce of the latter and continuing the commercial warfare between the states which it was one of the main objectives of the framers of the Constitution to suppress. See Madison, Debates in the Federal Convention of 1787, August 28, 1787 (Hunt & Scott ed.) 479; *Brown* v. *Maryland*, 12 Wheat. 419, 440.

1. *Established interpretations.* As an original proposition, it might well be doubted that a general property tax not discriminating against imported goods is "an impost or duty on imports". The Supreme Court of the United States has held that such a tax is within the purview of the constitutional provision, however, and of course we are bound thereby. *Low* v. *Austin*, 13 Wall. 29, 34.[1]

The leading case on the interpretation of the constitutional provision is *Brown* v. *Maryland*, 12 Wheat. 419, in which a state statute requiring importers of foreign goods by bale or package to take out a license and pay a fee of $50 before selling the goods, was held to impose an unconstitutional impost on imports. The extensive opinion by Chief Justice Marshall is one of that jurist's landmark opinions and characteristically went beyond the necessities of the particular case. While the Maryland statute was plainly discriminatory against imports and might have been disposed of on that ground, the Chief Justice went further and declared in substance that a tax on an imported article in the hands of the importer is a duty or impost on

1. A distinguished scholar in this field, the late Prof. Thomas Reed Powell, commenting on the opinions in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, says "We could welcome fresh consideration whether property taxes should be regarded as 'imposts' or 'duties' ". 58 Harvard Law Review 858, 874.

the import. Referring to the above stated purpose of the constitutional provision, the Chief Justice said:

> "* * * it is plain, that the object would be as completely defeated by a power to tax the article in the hands of the importer *the instant it was landed*, as by a power to tax it while entering the port. * * * A duty on imports is a tax on the article which is paid by the consumer. The great importing States would thus levy a tax on the non-importing states * * *" (pp. 439-440).

Conceding that the immunity cannot follow the import indefinitely, and must end somewhere, the Chief Justice proceeded:

> "But, while we admit that sound principles of construction ought to restrain all Courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is *the instant that the articles enter the country.* It is, we think, obvious, that this construction would defeat the prohibition." (p. 441.)

The Chief Justice recognized that it would be futile to try to stake out in advance the line where immunity ceases and the states' power to tax attaches.

> "The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. * * * Yet the distinction exists, and *must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.*" (p. 441.)

Nevertheless, and we must assume tenatively in view

of the language just quoted,[2] he suggested the following principle:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (pp. 441-442.)

Chief Justice Marshall said much more in the course of his lengthy opinion, by way of argument, illustration and dictum, and on another branch of the case held that the Maryland statute was also invalid under the commerce clause of the constitution (Art. I, sec. 8). It is no disparagement of the great Chief Justice to point out that some of his dicta have not been followed by the court in later cases,[3] as for example, that to the effect that the principles laid down in *Brown* v. *Maryland, supra,* would apply equally to importation from a sister state (12 Wheat. at 449). It has later been held consistently that goods brought from another state are not imports within the meaning of Art, I, sec. 10 of the United States Constitution. *Woodruff* v. *Parkham*, 8 Wall. 123, 136, *American Steel & Wire Co.* v. *Speed*, 192 Wis. 500, 520. Likewise his original package doctrine has been repudiated as a

2. "But he (Marshall) had too much of an instinct for the practical to attempt rigidities which could not possibly bind the future * * * and so his views were often tentative and suggestive; they conveyed cross-currents of doctrine and purposed ambiguity." Frankfurter, The Commerce Clause, 44-45.

3. "* * * the rule announced in *Brown* v. *Maryland* has at times been severely criticized * * * and has in some cases been narrowly restricted in its application * * *." Black, J., dissenting in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 688.

criterion of immunity of interstate shipments under the commerce clause, from state taxation. *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506.

While *Brown* v. *Maryland* dealt with a statute prohibiting sale of imported goods by the importer without payment of a license fee, it has been accepted as authority for the broader proposition that the imported goods themselves cannot be taxed while held in the importer's warehouse in the original package, for resale. *Low* v. *Austin*, 13 Wall. 29, 34, *May* v. *New Orleans*, 178 U. S. 496, 507. Immunity does not depend upon a showing that the tax is in fact discriminatory against imports. *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 76. After the merchandise has once been sold by the importer, however, it is taxable as other property, even though remaining in the original package. *Waring* v. *Mayor*, 8 Wall. 110, 122.[4] If the goods are taken out of the original outer package, even before sale, their immunity as "imports" ceases though they are still in smaller original packages. *May* v. *New Orleans*, 178 U. S. 496, 508-509.

Brown v. *Maryland*, *supra*, and most of the earlier cases dealt with attempts to tax directly or indirectly, goods held for resale. The leading case on state taxation of imports held by the importer for use in manufacture is *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, decided in 1945. In that case it was held that bales of hemp brought from the Phillipine Islands and stored in a manufacturer's warehouse in Ohio preliminary to use in the manufacture of cordage were imports in the hands of the importer within the meaning of Art. I, sec. 10, United States Constitution, and under *Brown* v. *Maryland*, *supra*, were immune from state ad valorem taxes (pp. 664-668). Four justices dissented from that feature of the decision now

4. A pledge of the goods by the importer has been held to terminate their immunity. *Southern Pac. Co.* v. *Calexico*, 288 Fed. 634, 641.

pertinent, in an opinion by Mr. Justice Black, 324 U. S. at 686.

In *Hooven & Allison Co.* v. *Evatt, supra,* the court recognized that the constitutional immunity from state taxation is lost when imported goods are put to the use for which they were imported, or when the original packages in which they were imported are broken (324 U. S. 652, at 665, 666). However, the majority was unwilling to terminate the constitutional immunity when the goods reached the factory warehouse in the original package.

> "But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation." (p. 666.)

On the contrary, the majority affirmed the dictum of Chief Justice Taney in *License Cases,* 5 How. 504, 575.

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the state usually taxed for the support of state government." (324 U. S. at 666.)

Nevertheless the majority cautiously limited the decision to the case before it, holding that "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original package." (p. 667); and expressly saved the question which is before us today.

> "And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original

packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 667.

Even this carefully limited decision commanded the support of only five of the justices. The other four dissented in an opinion by Mr. Justice Black, who considered that every conceivable relationship the bales of hemp had once borne to the process of importation had ended, and that therefore they were no longer immune as imports; and also pointed out that to accord them constitutional immunity from property taxes would effect a discrimination in favor of foreign as against domestic products. 324 U. S. at 686-691.

To sum up the state of the law to date, it appears that imported goods are immune from even non-discriminatory taxes on general property until sold by the importer, or removed from the original packages in which imported, or put to the use for which acquired, as where placed in process of manufacture. The Supreme Court has held, by the narrowest of margins, that the mere warehousing of the goods preliminary to manufacture does not of itself terminate the immunity. The application of the tax to raw materials stored at the importer's factory, which, though still in the original package, are essential to current manufacturing requirements has been expressly left undecided.

2. *The imported lumber.* The lumber in issue was imported from Canada in carloads of individual pieces not bundled or fastened together, and was unloaded and piled

in plaintiff's storage yard to facilitate air-drying. We have little difficulty in holding that it had ceased to be immune from the city's general property tax on the assessment date.

The lumber is not protected from taxation by the original package doctrine, for it was unpackaged, unless the freight car be considered a package, in which case it was removed from the original package when unloaded. The individual sticks of lumber themselves are certainly not packaged or packages in any reasonable sense of the term. *E. J. Stanton & Sons* v. *County of Los Angeles,* 78 Cal. App. (2d) 181, 188, 177 P. (2d) 804, 808. Cert. den. 332 U. S. 766.

Moreover, these pieces of lumber had "entered the process of manufacture", and thus had been "put to the use for which they were imported" (*Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 657, 666) when they were stacked for air-drying, since the drying of the lumber was essential to manufacture, and therefore a first step in the manufacturing process. It was not necessary that the lumber be sawed up in order to place it in process of manufacture. The imported article consisted of a combination of wood and diffused water. Drying separates the wood from the water; sawing separates wood from wood. If the lumber had not been air-dried, it would have had to be kiln-dried for a longer time. Obviously it would be in process of manufacture when drying in an artificially-fired kiln. Removal of water is no less a manufacturing operation when performed out of doors by solar heat.

Insofar therefore as the judgment holds the lumber taxable, it must be affirmed.

3. *The imported veneers.* These present a much closer question. They were still in the original packages in which they were imported, consisting of metal straps around bundles of pieces in most cases, and of wooden crates in

thers. We assume for present purposes that straps holding bundles of pieces are a package. The veneers had not been subjected to any process to alter their form or chemical composition, but had merely been stored in plaintiff's warehouse to await processing.

If no other facts appeared, and on the assumption that straps around a bundle make a package, we would be constrained to hold the veneers immune from the city's tax on the authority of *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, discussed above, notwithstanding the dissent of the maximum minority from that decision and our own philosophical doubts about its correctness. But there are other facts in the present case which in our opinion are sufficient to distinguish it from that one.

In the instant case it was found as a fact by the trial court, and the finding is not challenged by appellant, that the veneers which were actually taxed were required to be on hand because reasonably necessary to meet plaintiff's current operational needs as a manufacturer. In making that finding, the trial court recognized the practical fact of industrial life, that if a manufacturer is to maintain the continuity of operation that is essential to efficiency and ability to meet competition and thus stay in business, he must at all times maintain on hand at his plant and ready for immediate use, a certain minimum stockpile of raw materials; and from that fact he stated the following conclusion:

> "If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable

> that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's ad valorem personal property tax."

The trial court's finding brings the present case squarely within the category which was expressly left undecided in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 667, quoted page 8 above, and which we may therefore decide on its merits.

We think the trial court was right in holding that the minimum stockpile of veneers which the manufacturer had to have on hand to meet current requirements was in substance being put to the use for which the raw materials were imported, even though not yet removed from their wrappings or subjected to any physical or chemical change. As to such goods, a rule which would make taxability depend upon the cutting of some metal bands or removal of a wrapping, would be too artificial and mechanical to commend itself. We think it would be equally mechanical, and disregardful of realities, to hold that the manufacturer must inaugurate some process of physical or chemical change before the goods can be considered as put to the use for which they were imported or can be regarded as a part of the mass of property which may be taxed for the support of state government. Foreign commerce, like commerce among the several states, "is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co.* v. *United States*, 196 U. S. 375, 398. As a practical matter, the minimum current operational requirements of materials which the manufacturer had assembled in his plant for purposes of immediate availability for change in form were in use in

and devoted to the manufacturing enterprise, as much as if they were being dried, heated, reshaped, chemically treated, or otherwise changed in form or composition. The purpose for which the veneers were imported was to meet the requirements of a going manufacturing concern; and one of such requirements was the presence of a stockpile equal to minimum current manufacturing requirements. As a practical matter, a manufacturing enterprise cannot be carried on successfully without having current operational requirements of raw materials on hand, especially where it takes a considerable time to get more of the materials after ordering them, any more than it can be carried on without changing their form or composition.[5] The decision under review merely recognizes and gives significance to that fact of industrial life.

We appreciate that there are expressions in the decisions of the U. S. Supreme Court which may be cited against the conclusion we have reached; but they must be read in connection with the facts of those cases. No case has been brought to our attention, nor have we found any, in which the facts on which the trial court based its decision in the present case were found to exist and were brought to the attention of the Supreme Court. In the one case where the argument was made, it was rejected and decision was specifically reserved on the point, because the record did not afford a basis for saying that any part of the imported material was required to meet immediate operational needs. *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 664, 667.

We think it accords with sound policy, and does no violence to either the purpose or the words of the constitu-

5. Respondent's brief puts the proposition picturesquely as follows: "If, when dawn broke over Algoma on the first day of May, 1955, appellant had everything on hand except the imported raw materials necessary to meet current manufacturing requirements, it is reasonable to assume that appellant would have been out of the manufacturing business, at least temporarily."

tional provision, to hold that the city may tax the imported veneers in question. We are satisfied that the rule we are adopting preserves the immunity of imports long enough to serve all purposes for which the provision was adopted. The tax is not discriminatory, for it applies alike to all comparable property in the city, regardless of origin. The city has furnished a *quid pro quo*, by extending its police and fire protection to the veneers and lumber as to other property. The tax cannot prejudice foreign commerce, nor afford a means by which seaport or border states can burden the others or wage commercial warfare against them by taxing their imports, fear of which activity was the motive for adopting the constitutional provision.[6]

On the other hand, to hold that the immunity of imported goods extends to the point claimed by appellant, would work an affirmative discrimination against domestic materials and against manufacturers using domestic materials, and would enable the importing manufacturers to obtain police, fire and other local protection and benefits without paying for them. While such discrimination also results from some application of the constitutional provision in question by which we are bound, it is nevertheless proper to consider it as a relevant factor in determining whether the immunity should be extended beyond the absolute compulsion of the decisions of the court of last resort.

It is argued that the original package rule is easy to

6. After a penetrating commentary on the majority and minority opinions in *Hooven & Allison Co.* v. *Evatt, supra*, the late Prof. Thomas Reed Powell said: "The immunity must survive to the extent that neither the goods nor dealings in them are, under any circumstances of time or place or condition, taxed or taxable because of their origin. To say that it must prevail against inclusion in general assessments after arrival or else be destroyed is to take an animistic view of the goods themselves as sacred objects and to forget the commercial aspects of foreign trade and domestic absorption." 56 Harvard Law Review, 858, 875.

administer, while it may be difficult to determine when imports have ceased to be imports as a result of becoming part of the stockpile required for current operational needs. We think, however, that the reasons both of constitutional law and policy against further extension of the immunity from state and local taxation outweigh mere problems of administration. Current operational requirements are a fact, not a fancy; and like value, they can be determined by the assessing authority, albeit sometimes with difficulty. The original package rule itself may present substantial administrative difficulties. See Mr. Justice Black's dissent in *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 691; and *E. J. Stanton & Sons* v. *County of Los Angeles*, 78 Cal. App. 2d 181, 186, 177 P. 2d 804, 807. In taxation, absolute certainty cannot be had or expected, as the numerous cases on valuation pointedly illustrate.

By the Court.—Judgment affirmed.

Brown, *J.* (Dissenting in part, concurring in part.) As an original construction of Art. I, Sec. 10, Cl. 2, U. S. Constitution, I would have little difficulty in agreeing with the dissenters in *Hooven & Allison Co.* v. *Evatt* (1945), 324 U. S. 652, 688, 142 Ohio St. 235, that when imported goods or raw materials have reached the place where the importer intends to put them to the use for which they were imported and he stores them until he needs them, a non-discriminatory *ad valorem* tax upon them does not offend the Constitution even though the goods or materials in such storage remain in their original package. The difficulty would be even less in agreeing with the majority of this court that part of the goods are taxable.

But I must recognize that this is not an original proposition and the dissenters' view in *Hooven & Allison* v. *Evatt, supra,* is that of a minority. The majority in that case reiterated the law as it has been established by an

unbroken line of decisions beginning with *Brown* v. *Maryland* (1827), 12 Wheat. 419, that the constitution protects imported items against local taxation while they are in their original packages and have not been disposed of or used by the importer. For examples see *Low* v. *Austin* (1871), 80 U. S. 29; *Anglo-Chilean Corp.* v. *Alabama* (1933), 288 U. S. 218, 225 Ala. 141, as well as *Hooven & Allison Co.* v. *Evatt, supra.*

In the latter case, the majority said, p. 666:

> "* * * no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable to state taxation. * * *"

And, further, p. 667:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. * * *"

The law, as I read it, is well settled by the decisions of the supreme court of the United States that until put to use or sold or otherwise disposed of by the importer materials in their original packages are not subject to a state tax. The veneers now in question satisfy all these conditions of immunity; and, like the fibers in *Hooven & Allison*, have not been subjected to manufacture. It is our proper province to apply that oft-stated law. It is not our province to modify it or to declare exceptions to it.

The argument, unsupported by the record, was made by the tax collector in *Hooven & Allison Co.* v. *Evatt, supra*, that some of the materials were so essential to current manufacturing requirements that they might be deemed to have entered the manufacturing process and so were taxable, as already put to use although still in their original packages. In reply to this the court said (p. 667):

there was no necessity and no occasion to consider that question. I cannot agree with the majority of our court that the form of the rejection of the argument changed the established law. The decision, in fact, *refused* to change it. Therefore I consider that this court is still bound to apply the law as it has been so often declared and as it remained when the court got through with *Hooven & Allison Co.* v. *Evatt, supra.* We, as a state court, have not been invited nor are we authorized to create an exception to the principle so often stated by the United States supreme court, that in the original package, unsold and unused imported materials are tax exempt. It is not for us to say that their immunity is lost when the day of use draws near. The United States supreme court was asked to make that change in the law. It would not. We should not.

Therefore, I think we must reverse, as to the veneers.

Respecting the lumber, the learned trial court found that the method of piling it had the dominant purpose of readying it for use. That finding makes it possible, I think, to agree that the manufacturing process had begun when the pile was constructed. Therefore I am able to concur in the decision that the lumber lost its status as an import and is taxable, though the ground that half of it is taxable because of current manufacturing needs is untenable.

I am authorized to say that Mr. Justice Currie and Mr. Justice Steinle concur in what is said here.

APPENDIX C.

Judgments of State Courts.

State of Wisconsin. Circuit Court. Kewaunee County.

UNITED STATES PLYWOOD CORPORATION, a Foreign Corporation,
Plaintiff,
vs.
CITY OF ALGOMA, a Wisconsin Municipal Corporation,
Defendant.
} Judgment.

The Court having by order herein, dated January 10th, 1957, directed that Judgment be entered herein in favor of the plaintiff and against the defendant, which order is on file herein;

NOW, THEREFORE, In Pursuance of such order and On Motion of Larkin & Blum and S. Knudson, attorneys for said defendant,

IT IS ADJUDGED That the plaintiff have and recover of and from the defendant the sum of $2,536.00.

Dated this 11th day of January, 1957.

By the Court.

/s/ ORVILLE J. ALBRECHT,
Clerk.

(Seal)

Judgment of Wisconsin Supreme Court.

And afterwards, to-wit: on the 7th day of January, A. D. 1958, the following proceedings were had in said cause in this Court:

UNITED STATES PLYWOOD CORPORATION, a foreign corporation,
Appellant,

vs.

CITY OF ALGOMA, a Wisconsin municipal corporation,
Respondent.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Kewaunee County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Kewaunee County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Ninety-nine Dollars and No Cents ($99.00).

Justices Brown, Currie and Steinle dissent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 44

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF PETITIONER.

ROGER C. MINAHAN,
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735 North Water Street,
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Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 44.

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF PETITIONER.

OPINIONS OF COURTS BELOW.

The opinion of the trial court, the Circuit Court of Kewaunee County, Wisconsin, is not reported officially but is set forth at R. 9-29.

The majority and minority opinions of the Supreme Court of Wisconsin (R. 34, 46) are reported in 2 Wis. 2d 567, 87 N. W. 2d 481.

JURISDICTION.

1. The judgment to be reviewed is that of the Supreme Court of Wisconsin dated and entered January 7, 1958 (R. 34).

2. The statutory provision believed to sustain the jurisdiction of the Supreme Court is 28 U. S. C. § 1257 (c).

3. Petition for certiorari was filed April 1, 1958. Certiorari was granted May 19, 1958 (R. 49).

CONSTITUTIONAL PROVISION INVOLVED.

The Constitutional provision involved is that part of Article I, Section 10, Clause 2 of the United States Constitution which reads as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and controul of the Congress."

QUESTION PRESENTED.

Is the levy of a general ad valorem tax by a state upon lumber and veneer imported by and stored in the taxpayer's storage yard and warehouse in the original form and packages in which they were imported and while remaining the property of the importer-taxpayer prohibited by Article I, Section 10, Clause 2 of the United States Constitution?

STATEMENT OF THE CASE.

This is a proceeding to review a judgment of the Wisconsin Supreme Court affirming a judgment which denied petitioner's claim for refund of a general ad valorem property tax paid under protest, assessed upon imported goods stored in its warehouse and storage yard by the petitioner-importer in the original packages or form in which imported.

United States Plywood Corporation, the petitioner, conducts a manufacturing business in Algoma, Wisconsin, under the name of the Algoma Plywood and Veneer Company division. On May 1, 1955, the assessment date of the general ad valorem tax, it used both foreign and domestic veneers and lumber in its manufacturing operations (R. 30). On May 1, 1955, petitioner had imported lumber and veneer stored in its warehouse and storage yard. It is the imposition of the tax on these imports which the petitioner has contested. Petitioner is not contesting the imposition of the tax on imported lumber and veneer which had been removed from petitioner's warehouse and storage yard to its factory.

Foreign veneers were imported by the petitioner from Canada, France and the Belgian Congo. The foreign veneers were received in Algoma in the original packages in which they were shipped. They were kept in such packages, segregated and stored in petitioner's warehouse until used in the manufacture of veneered products (Finding No. 4, R. 30). Veneers in original packages were piled separately according to specie, without regard to whether the adjacent pile was of foreign or domestic origin and without regard to the time of receipt. A portion of a new shipment of fuma veneer, for instance, would be placed on a partially depleted pile of that veneer and could be the first next taken for use.

Foreign lumber was imported by petitioner from Ontario, Canada. The lumber was imported in rough, unplaned form. It was shipped uncrated and unpackaged on railroad cars. The lumber, when received, was piled in the petitioner's storage yard. Both foreign and domestic lumber must be kiln dried by the petitioner before manufacture. The imported lumber air dried while in storage to varying degrees depending upon how long it remained in storage. Air drying reduced the time re-

quired for kiln drying. The trial court found that the dominant purpose of piling the lumber was to subject the lumber to air-drying before converting it into a manufactured product. It is good business practice and more economical to subject green lumber to air-drying before running it through the dry kilns. Most of the lumber in the storage yard on May 1st, 1955 was lumber received in green condition.

There was no co-mingling of foreign and domestic veneers or foreign and domestic lumbers so as to cause a loss of identity (R. 16).

On May 1, 1955, petitioner had on hand imported lumber and veneer valued at $288,593.00. The Circuit Court of Kewaunee County found that one-half of the imported lumber and veneer held in storage in the warehouse and storage yard, at a value of $144,292.26, was required to be on hand to meet petitioner's current operational needs as a manufacturer (Finding No. 9, R. 31).

Petitioner seeks review of that portion of the judgment of the Circuit Court for Kewaunee County, affirmed by the Wisconsin Supreme Court, which denied recovery of $2,677.46 in taxes assessed upon the imported lumber and veneer and which was paid by petitioner under protest.

Petitioner contended that the imported lumber and veneer were immune from general ad valorem taxation under Article I, Section 10, Clause 2 of the United States Constitution at every stage of the proceedings, originally in the protest of the assessment before the Board of Review of the City of Algoma (R. 5), then in the Circuit Court action for refund (R. 1), and thereafter by appeal to the Wisconsin Supreme Court (R. 34). The constitutional issue was discussed in the major portion of the Circuit Court's opinion (R. 9-29) and in the entire opinion of the Wisconsin Supreme Court (R. 34-47).

SUMMARY OF ARGUMENT.

1. While an import remains in its original package or form it retains its character as an import and a state tax levied on such property is prohibited by the United States Constitution. Petitioner's imported goods met the established tests for determining status as imports. In order to retain character as an import and hence immunity from state taxation, the importer must not incorporate or mix the import with the mass of property in the country. Although an import ceases its movement in interstate commerce, it does not lose its immunity from state taxation because it has ceased to move in such commerce.

2. Goods imported for the purpose of manufacture do not lose immunity any sooner than goods imported for the purpose of sale. Wisconsin can not tax a manufacturer's imports because of his intention to act upon the goods in the future. To do so would draw a distinction between goods imported for sale and goods imported for manufacture.

3. The state courts have followed the holdings of this court that a manufacturer's imports stored awaiting use are not being subjected to manufacture.

4. The Wisconsin court taxed the imports in question because they were required to be kept on hand for petitioner's current operational needs. This theory is impractical, was improperly applied by the Wisconsin Court and infringes upon the Federal Government's power to control the flow of imports.

5. The veneer imported by petitioner was stored in a warehouse in the original packages in which imported. Such veneer met all the established tests so as to retain its immunity from tax. Such veneer could not constitutionally be taxed on the grounds that it was required to be kept on hand for petitioner's manufacturing

operations. The trial court found that not only was the imported lumber taxable because required to be kept on hand for petitioner's current operational needs, but also because the lumber had entered the manufacturing process by virtue of being stacked in segregated piles. The stacking of the lumber in segregated piles was not acting upon the goods so as to incorporate them into the mass of taxable property in the country.

ARGUMENT.

I.

Goods Imported, While Retaining Their Character as Imports, May Not Be Subjected to General Property Taxes by a State.

The Supreme Court of Wisconsin affirmed the levy of an ad valorem property tax upon petitioner's imports because these imports were needed for petitioner's "current operational needs" as a manufacturer. Petitioner contends the levy of such tax was unconstitutional.

The basis for the constitutional immunity of imports is found in Article I, Section 10, Clause 2 of the United States Constitution which provides in part as follows:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *"

At an early date this Court held that until an import loses its character as such, a state tax on the imported property is prohibited by the United States Constitution. *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678 (1827).

Tariffs, excises and duties on imports have been an important source of Federal revenue. This source of revenue was reserved to the Federal Government in the Constitution. The Court in the *Brown* case, *supra*, pointed out that the importer purchases from the Federal Government a privilege of immunity from state taxation. Importers retain the privilege of immunity as long as the import retains its character as an import. The *Brown* case, also held that the immunity of imports from state taxation

rests upon the mere fact that the property is an import. The character of the property as an import is to be determined by its physical condition and not by its relationship to commercial or future use.

This fundamental principle, over the intervening years, has been reaffirmed by this court. *Low* v. *Austin*, 13 Wall. 29, 20 L. Ed. 517 (1872); *Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015 (1878); *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 65 S. Ct. 870, 89 L. Ed. 1252 (1945).

In this case, the parties agree that the lumber and veneer sought to be taxed by the respondent, City of Algoma, had been imported from without the United States of America by the petitioner as an importer. The veneer was stored in petitioner's warehouse in bundles or wood crates, the same packages in which it was imported. The lumber was received unpackaged and uncrated and was stacked in separate segregated piles in a storage yard, in the same form in which it was imported. The lumber and veneer so imported acquired immunity from taxation by the respondent City of Algoma as long as the property retained its character as an import.

II.

Imported Goods, While Remaining the Property of the Importer, Stored in His Warehouse in the Original Package or Form, Do Not Lose Their Character as an Import.

In *Brown* v. *Maryland, supra*, the court found that the importer had not acted in any way upon the imported goods so as to mix them up with the mass of property in the country by simply storing the imports in a warehouse in the original form of importation. The imports were stored awaiting sale. Notwithstanding this necessary

implication of future sale, the Court held that while imports were in that status or condition, with nothing more than intended sale of presumably varying degrees of imminence, a clear type of immunity from state tax existed. This Court there said:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." *Brown* v. *Maryland, supra,* at pp. 441-2.

Subsequent to *Brown* v. *Maryland, supra,* the "original package" doctrine, and the plain or clear case of immunity, was reaffirmed in the following language:

> "Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the state usually taxed for support of the State Government." *Low* v. *Austin, supra,* at p. 34.

It was considered possible in the *Brown* case that other circumstances might arise, as they later did, such as hypothecation of the goods or changes in condition by artificial means, which might change the character of the goods as imports. But the Court held that mere storage, evidently regardless of the imminence of sale, was the clear case prohibiting state taxation. If all that had occurred was receipt of such goods and its storage by the importer in his warehouse prior to his acting upon the goods in some way to incorporate them and mix them up with the mass of property in the country, they clearly had

not lost their character as an import. See also *Low* v. *Austin, supra; Southern Pacific Co.* v. *City of Calexico*, 288 Fed. 634, (D. C. Cal., 1923).

The trial court, and to a major degree the Wisconsin Supreme Court, in considering import immunity, relied upon principles adopted by this Court governing goods in interstate commerce. These rules are of no assistance in dealing with foreign imports since the legal inquiry is so essentially different.

In the case of imported goods, the problem is to ascertain when the goods have ceased to have the character of an import. This depends to a high degree upon the status or condition of the things imported and this court has never said or indicated that immunity was in any way determined by whether the import had ceased its movement in commerce or transportation, actually or constructively. In determining status or condition the fact that the goods while remaining the property of the importer are kept in storage in the original packages in which imported is very persuasive that the character of the goods as an import has not changed. Hence, the original package factor is far more determinative of the issue than it would be where the inquiry is as to matters not primarily affected by character or status, as is the case in state taxation of goods in interstate commerce.

In the cases involving burdens on interstate commerce, the principle of exemption from tax has been based upon the fact that the goods are in movement between one state and another. In such cases the essential element is not the character or condition of the goods but whether their movement has ceased and the goods have come to rest in the state claiming the right to burden them with taxation or otherwise. No burden on interstate commerce results when the tax is levied upon goods which have ceased to

move in commerce. Temporary stay-overs have been held not to evidence conclusively that the goods have come to rest. Some cases rely on the original packaging of goods to evidence the fact that the goods are still in transit. While recognized as a factor in determining motion or transit, the original package rule is clearly less persuasive in commerce clause cases since in many instances the goods have come to rest in original packages. There is very slight likelihood of further transportation out of the state in the original package where a manufacturer buys goods in another state or when a wholesaler does so and stores the goods. In this type of inquiry the fact that the goods remain in the original package is not too persuasive. This has been emphasized in such cases by the courts. *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 24 S. Ct. 365, 48 L. Ed. 538 (1904); *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 43 S. Ct. 595, 67 L. Ed. 1095 (1923).

When considering the immunity of an import, the character of the goods and not their motion or probability of further motion is the issue. Hence, imports which remain in the hands of the importer in his warehouse or storage yard in the original package or form in which imported are, upon the principles consistently recognized by this court, plainly exempt from state taxation since their character or status has not changed. Degrees of imminence of use do not aid in this determination, however helpful this factor may be in ascertaining likelihood of further movement in interstate commerce.

In *Hooven & Allison Co.* v. *Evatt, supra,* Chief Justice Stone noted that cases dealing with interstate commerce and state taxation are not applicable to import cases.

> "We have often indicated the difference in this respect between the local taxation of imports in the original package and the like taxation of goods, either before or after their shipment in interstate commerce. In

the one case the immunity derives from the prohibition upon taxation of the imported merchandise itself. In the other the immunity is only from such local regulation by taxation, as interferes with the constitutional power of Congress to regulate the commerce, whether the taxed merchandise is in the original package or not. The regulatory effect of a tax, otherwise permissible, is not in general affected by retention of the merchandise in the original package in which it has been transported." (324 U. S. at pages 665, 666.)

The original package or form doctrine is not always completely determinative of the issue as to change in the character of the goods as an import. Sale in the original package by the importer, thus putting the goods to the use for which imported, terminates their character as an import. *Waring* v. *The Mayor,* 8 Wall. 110, 19 L. Ed. 342 (1869). Change in title, even for credit purposes, is so acting upon the goods or putting them to the use for which they were imported as to change their character. *Southern Pacific Co.* v. *City of Calexico, supra.* Though these situations also come within the qualification to exemption specified by *Brown* v. *Maryland, supra,* that the property must remain the property of the importer, this is the kind of situation Chief Justice Marshall must have had in mind when he said that it might be premature to state any rule as being universal in its application and was one of the distinctions which was to be marked as the cases arose. This is not in any way in conflict with the basic principle. In the absence of any factors more than storage in original packages and without the importer in some way acting upon the goods, the imports do not lose their character as such.

Hence, Chief Justice Stone, in the *Hooven* case, observed that if the goods remain in the original package, stored in the importer's warehouse, while remaining his property, this Court has uniformly held taxation of the goods is prohibited by the constitutional provision.

III.

Goods Imported for Manufacture Do Not Lose Their Character as an Import Any Sooner Than Goods Imported for Sale.

It has been pointed out that "the object of importation is sale," and "importers for sale" have no purpose other than to sell the import. *Brown* v. *Maryland, supra.* The immunity from state taxation is not lost because the importer intends to sell. It is lost only when the sale is made. *Waring* v. *The Mayor, supra.*

No distinction can be made between an "import for sale" and an "import for manufacture."

> "We do not perceive upon what grounds it can be thought that imports for manufacture lose their character as imports sooner or more readily than imports for sale." *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652 at page 667.

The Wisconsin Supreme Court in the case at bar disregarded this clear ruling of the United States Supreme Court. The Wisconsin Court begins its analysis of the constitutional immunity of imports by observing that most of the early cases involved imports for sale. It then recognizes *Hooven & Allison Co.* v. *Evatt, supra,* as the leading case involving imports for manufacture (R. 39). The court then emphasizes the narrow majority which prevailed, and what it describes as a cautious limiting of the ruling in the *Hooven* case by this Court (R. 40). To reach a result which causes a manufacturer's imports to lose their character as imports more readily than imports for sale, the Wisconsin Court erroneously bases its decision on the rules for determining when goods have ceased to be the subject of interstate commerce (R. 43).

The state courts have applied a contrary rule:

> "We find no reason or authority for distinguishing between imports intended for sale and those intended for use by the importer in some manufacturing process." *Washington Chocolate Co.* v. *King County*, 21 Wash. 2d 630, 152 P. 2d 981 (1944).

The Wisconsin Court majority reached its conclusion by the application of rules this Court has clearly held inapplicable.

IV.

Imported Goods Do Not Lose Their Character as Imports Because Stored by the Importer Awaiting Use by Him.

The courts have held consistently from their earliest consideration of this problem that although the owner may use imports in the future, this does not alter their character as an import.

The argument that proposed sale changed the character of the goods as an import was advanced in *Brown* v. *Maryland, supra,* and rejected. The same argument with respect to intended use was also rejected in the *Hooven* case.

The Wisconsin courts also sustained the tax on the imported goods on the theory that because the importer assembled the goods for the purpose of changing their form, they had been put to use by him. This, the Wisconsin Court says, is not because of any acting upon the goods by the importer or any change in form effected, but because of its immediate availability for such use (R. 44). This is to deem accomplished that which in fact admittedly has not been accomplished. This specious reasoning was rejected in *Brown* v. *Maryland, supra,* and in *Hooven & Allison Co.* v. *Evatt, supra.* Chief Justice Stone, in the latter case, stated:

> "It is quite another matter to say, and Chief Justice

> Marshall did not say, that because they may be taxed when used, the importer may not hold them tax free until the original packages are broken or until they are put to the use for which they are imported. He said, 12 Wheat. at page 443, 6 L. Ed. 678: 'The same observations [i. e., the importer has mixed the goods with the common mass of property, rendering them taxable] apply to plate, or other furniture *used* by the importer.' (Italics added.)" 324 U. S. at page 665.

State courts have followed the rule that imports of raw material stored in original packages while awaiting use are immune from state taxation. In *Washington Chocolate Co.* v. *King County, supra,* the Supreme Court of the State of Washington held that the State was prohibited from levying an ad valorem property tax on imports held by a manufacturer and awaiting use. The manufacturer imported cocoa beans and stored the original packages in its warehouse where the beans remained until processed by the manufacturer into chocolate and cocoa. The Washington Court discussed numerous cases, including the 1943 decision by the Ohio Supreme Court in the *Hooven* case, and concluded the imports were immune from taxation while stored in the original packages awaiting use by the manufacturer.

> "Respondent is engaged in the manufacture of chocolate and cocoa from cocoa beans, and cannot be penalized because it imported a large quantity of the raw material which was the chief ingredient of its manufactured product." 152 P. 2d at page 992.

Certiorari was denied in the *Washington Chocolate* case, 324 U. S. 880, 65 S. Ct. 1022, 89 L. Ed. 1831 (1945).

The Missouri court in *American Mfg. Co.* v. *City of St. Louis,* 238 Mo. 267, 142 S. W. 297 (1911), held that raw material for bag manufacture imported by the manufacturer and stored in original packages was immune from state taxation. The court noted that to tax such raw materials

would discourage these imports to the same extent as a tax upon imports for sale, contrary to the spirit of the constitutional immunity.

The question of taxability of goods stored awaiting use, if it had been considered open prior to the decision of *Hooven & Allison Co.* v. *Evatt, supra,* was clearly disposed of in that case. The Ohio Supreme Court held that imported fibers though stored in their original package in the importer's warehouse, ceased to be an import and lost immunity from tax because they were stored awaiting use by the importer in its manufacturing operations. An ad valorem property tax was assessed upon these goods by the State of Ohio in the same manner in which the lumber and veneer were here assessed. The Court held that though the imports were stored pending use in the taxpayer's manufacturing operation, they had not lost their character as imports.

V.

Before Being Subjected to Manufacture, Imported Goods Stored by an Importer-Manufacturer in Original Packages or Form Do Not Lose Their Character as an Import.

Although the matter apparently had not been urged upon the Ohio courts, the argument was made in this Court in the *Hooven* case that part of the goods so stored awaiting use might be deemed as within the current operational requirements of the importer-manufacturer and could be carved out for assessment; thus some of the goods "awaiting use by the importer" could be subjected to tax. This is the essence of the holdings of the Wisconsin courts here for review. This is an attempt to do under one label the precise act repeatedly condemned under another.

The Wisconsin Court observed that the leading case which considered imports for manufacture is this court's decision

in *Hooven & Allison Co.* v. *Evatt, supra.* This decision discussed imports of this character more extensively than other cases that dealt with the same problem.

In *Gulf Fisheries Co.* v. *MacInerney,* 276 U. S. 124, 48 S. Ct. 227, 72 L. Ed. 495 (1928), Justice Brandeis, for this Court, stated that the fish involved, if they once were imports, had been so acted upon by the importer that at the time of taxation they were no longer in their original package or form, and hence were taxable.

For the first time in *Hooven & Allison Co.* v. *Evatt, supra,* this Court met the contention there suggested that property which had not in any way been acted upon or subjected to manufacture could be taxed because of the purpose of the importer and the imminence of its intended use. Although the specific question had not been presented in *Brown* v. *Maryland,* Chief Justice Marshall observed that *until used,* imports retained their character as imports and were immune from state taxation even though the import was intended to be used by the importer. This immunity was recognized by the court in *Hooven & Allison Co.* v. *Evatt, supra,* notwithstanding the intended or imminent use of the import. This Court condemned the suggestion that goods may be taxed merely because they are awaiting use. The decisions of this Court which have permitted imported goods to be taxed when subjected to manufacture all involved actual physical acting upon the goods. Taxes on imports which were awaiting use or intended to be used, but remained in their original packages, have been uniformly condemned. This Court in the *Hooven* case reaffirmed its position in this respect in the following language:

> "But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported, are liable

> to state taxation. On the contrary, Chief Justice Taney, in affirming the doctrine of *Brown* v. *Maryland*, in which he appeared as counsel for the State, declared, as we now affirm: 'Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government.' License Cases, 5 How. 504, 575, 12 L. Ed. 256." 324 U. S. at page 666.

In condemning the "awaiting use" theory this Court rejected this attempt to reach such goods when it said that imports were not subjected to manufacture when they were placed in the importer's warehouse in their original packages. In the *Hooven* case, *supra*, the Court said:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages." 324 U. S. at page 667.

Accordingly, as observed by the dissenting opinion of the Wisconsin Court, the law is well settled that goods stored awaiting use remain imports and are not subject to tax regardless of the importer's intention to use them in future manufacture and regardless of the imminence of their use. The Wisconsin Court minority correctly concluded that the form of the rejection of the argument of the tax collector in the *Hooven* case did not change the established law and that the decision in fact clearly refused to change it.

VI.

The Wisconsin Court's Exception to the Traditional, Well Defined Rules Is Impractical, an Unwarranted Extension and Infringes Upon the Power of the Federal Government.

(a) Loss of character of goods as imports, based on the "current operational needs" theory of the Wisconsin Court is impractical and unreasonable.

The possibility of a "current operational needs" theory, suggested by Chief Justice Stone's dictum in the *Hooven* case, purports to be the basis for the Wisconsin Court's decision. The Wisconsin Court draws upon one sentence in the *Hooven* case to support it in this result. However, the *Hooven* opinion cannot be read as supporting the Wisconsin Court's version of any "current operational needs" theory. The most that can be said is that the majority opinion contains *dictum* concerning a possible reservation of a question.

Chief Justice Stone in the *Hooven* case confirmed the purpose of the court over the years to find a point, "capable of practical determination, when it can fairly be said that" imports have become a part of the mass of taxable property within a state. The Wisconsin concept of "current operational needs" cannot be said to mark such a point since it calls for a completely subjective determination and virtually defies definition. This concept would mean many different things depending upon the type of industry involved, the state of our economy or season.

Chief Justice Stone emphasized both the fairness and ease of administration of the established rule, calling attention to the very slight amount of litigation which the principles adopted and adhered to by this court for so many years had produced. In *Washington Chocolate Co.*

v. *King County, supra,* the court emphasized this factor in the following language:

> "The doctrine that while remaining in the original package in which it was imported the merchandise is exempt from taxation has the advantage of certainty, and pursuant to the opinions of the Supreme Court, may be easily applied in any case of admitted or proven facts." 152 P. 2d at page 992.

It is clear that the Wisconsin "current operational needs" theory would be simply a partial recognition of the "awaiting use" theory, carved out from the latter, and used in an attempt to reach immune imports in order to subject them to tax. The test is unsound since it depends entirely upon the importer's intention. The Wisconsin Court rejected these arguments on the ground that principles equally difficult of application, such as determinations of value, have been adopted by the courts. It would seem that little argument is required to demonstrate that, however difficult determinations of value may be in some situations, it is capable of far greater accuracy than a determination of any single industry's "current operational needs" at any one point of time.

Value has been defined and is from time to time, or in comparable situations, confirmed by established facts. "Current operational needs", as used by the Wisconsin Court, is not defined and because of the difficulty in application to various businesses, probably cannot be. Some indication of the difficulty this presents may be found in the trial court's opinion in this case where it speculates on methods for finding a rule for ascertaining what is meant by "current operational needs" (R. 14, 15). In order to give it the meaning necessary to terminate the immunity of the goods at an earlier point in this case, shipments in the course of transportation at the time had to be and were ignored. This was not recognizing the

facts of economic or industrial life which the Wisconsin Court said must be respected in applying the Constitutional provision here involved.

In addition to the variations of "current operational needs" from industry to industry, and from time to time, most industries must vary material usage to meet the varieties of orders received. Accordingly, most industries find substantial variations in the consumption of their different kinds of materials. Hence, it is extremely difficult to establish patterns which would form any basis for determining how much of varying types of material, foreign or domestic, would be required. An industry may run for some period of time on one kind of material and suddenly switch to another for an extended period of time. Thus, with respect to material on hand, it would be often difficult to ascertain how long a supply for manufacturing needs will last. Adoption of the Wisconsin Court's "current operational needs" theory, assuming the term could be defined, would be to go to the extreme opposite of that "point * * * capable of practical determination" which the courts have recognized as requisite to a sound rule. Industry as well as the administrators of the taxing authorities require a method of certainty for the purpose of ascertaining tax liability in order to avoid gross inequities in the burden of those taxes. Tax assessment should be as objective as it can be made and not as subjective as a test of this character would require.

If the "current operational needs" theory of the Wisconsin Court were to be adopted, either tremendous uncertainty and grave difficulty in administration and, therefore, inequity would result, or virtually all imported goods "awaiting use" would be taxed. Importers, in these days of high costs of maintaining inventories, will keep on hand no more than their best estimate of their "current operational needs" dictate. To do so would place them at a severe dis-

advantage with their competitors because of the costs of carrying such an inventory. This would be true of importers for sale as well as importers for manufacture. If, as has been said, the immunities provided are practical concepts, then the inevitable result of the practicable application of this vague and uncertain term would inevitably lead to the taxation of all such goods on hand.

The Wisconsin "current operational needs" theory compels the application of rules applicable to the commerce clause of the constitution. It must ignore the nature of the import clause which by necessary implication contemplates some affirmative act of the importer to effect a change in the character of the goods as an import. The arguments in support of loss of immunity of imports are, under this approach, ultimately resolved by emphasizing that movement in commerce has ceased. This concept is not relevant to inquiry regarding the immunity of imports from state taxes and cannot reasonably be used for the purpose of ascertaining a change in character of an import. Hence, use of the Wisconsin "current operational needs" concept to sustain a tax requires the adoption of a vague and uncertain phrase incapable of being defined and implemented by tests applicable to other parts of the Constitution dealing with unrelated matters. On no accepted rules of construction or logic can the result reached by the Wisconsin Court be defended.

(b) Accepted accounting principles provide a practical and reasonable rule of interpretation.

This court stated in *Hooven* that it has been recognized since *Brown* v. *Maryland, supra*, that "the reconciliation of the competing demands of the constitutional immunity and of the state's power to tax, is an extremely practical matter" (324 U. S. at 668). It is difficult to imagine a solution to the problem of ascertaining when status changes which is more practical or reasonable than a rule

based upon the accepted principles of the science and practice of accounting. This represents the generally accepted meaning of terms in the everyday working world of commerce and industry.

The accounting profession recognizes a distinction between materials being used in the process of manufacture and materials not being so used. The following language from the "Accountants' Handbook", edited by Rufus Wixon, professor and chairman of the accounting department of the University of Pennsylvania's Wharton School of Finance and Commerce points out the line of distinction:

> "The principal types of assets included under inventories are:
>
> 1. Merchandise.
> 2. Materials.
> 3. Supplies.
> 4. Work in process.
> 5. Finished goods.
>
> "* * * *Materials* consist of goods purchased by a manufacturer or converter with the intention of physically incorporating them into the final product of the manufacturing or conversion operation. Such goods may be raw materials, or they may be partially fabricated commodities secured from other concerns * * *
>
> "* * *
>
> "*Work in process* includes all materials to which manufacturing services have been applied and upon which further production operations are necessary before the product is ready for sale * * *." (Fourth Edition, page 12.1.)

Imported materials should not be deemed to be in the process of being used for the purpose for which they were imported until such time as the commercial and industrial world would generally understand and determine, in accordance with accepted principles of accounting and without regard to tax considerations, that the materials in

question should be transferred from an importer-manufacturer's "materials" account to his "work in process" account. This rule is a reasonable and practical solution to the problem. Inasmuch as a transfer from "materials" account to "work in process" account will generally, if not invariably, occur simultaneously with a change in the location of the materials and/or the initiation of a change in the form or composition of the materials, the transition of the status of imported materials from that of an "import" to that of a "non-import" will be marked by objective circumstances and clearly ascertainable events, the occurrence or nonoccurrence of which cannot ordinarily be the subject of dispute. A situation in which the courts would be required year by year to resolve disputes between tax assessors and importer-manufacturers as to what portion of the inventories of imported materials held for use by importer-manufacturers are necessary in order to meet their "current operational needs" thus will be avoided, and the distinction will conform to the general understanding in industry and commerce as to when an import loses its character as such. The rule fits all of the principles of interpretation of this constitutional provision consistently recognized by this Court since the first case decided in 1827.

(c) The Wisconsin Court's interpretation of "current operational needs" is an unwarranted extension of the possible exception commented upon in the *Hooven* case *dictum*.

In holding that one-half of the imported materials were required to meet the current operational needs of the Petitioner, the Wisconsin courts relied on Mr. Chief Justice Stone's possible reservation of the question "whether, for purposes of the constitutional immunity, the presence of some fibers *in the factory* was so essential to current manufacturing requirements that they could be said to have

entered the process of manufacture", 324 U. S. at 667. Careful analysis of the entire paragraph in which the above-quoted language appears will reveal that the arbitrary allocation of one-half of the imported materials to the so-called "current operational needs" of the Petitioner does not render those materials subject to state taxation within the meaning of Chief Justice Stone's dictum. The Chief Justice said:

> "It cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages. And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question."

The Chief Justice begins his discussion by stating unequivocally that "It cannot be said the fibers were subjected to manufacture when they were placed *in petitioner's warehouse* in their original packages." He then finds it "unnecessary to decide whether * * * the presence of some fibers *in the factory*" would render those fibers subject to state taxation presumably because, as was the fact, the record did not indicate whether any of the fibers were

placed in the factory in their original packages "to meet such immediate current [manufacturing] needs." The Chief Justice concludes by saying that the record afforded "no basis for saying that *any part* of petitioner's fibers, stored *in its warehouse* were required to meet such immediate current needs."

It is apparent from the Chief Justice's careful use of the words "warehouse" and "factory" that in his view, and presumably in the unanimous[1] view of this Court, "the current operational needs" of a manufacturing business are the "*immediate* current needs" of the business. All that the Chief Justice intimated was that if a taxpayer maintains its daily operational requirements of materials next to its machines in original packages, this Court might have to consider further the question whether such materials retained their status as imports.

But it is apparent from the Record that the imported materials which Wisconsin has attempted to tax were in storage in a warehouse or storage yard and had not in any sense been appropriated to use by the Petitioner. Petitioner has not contested taxation of the imported materials withdrawn from storage, but only the tax on that portion of the imported materials which remained in the warehouse or storage yard.

Turning to the Record on Appeal in the *Hooven* case, it becomes clear that the Wisconsin courts' interpretation of the "current operational needs" theory of Chief Justice Stone is unwarranted and erroneous.

The record in the *Hooven* case made it quite clear that the fibers held in storage by the petitioner constituted "a

1. As will be shown later, the dissenting opinion did not accept the contention of the State of Ohio that the Hooven Company's minimum working inventory was being "used" in that Company's current manufacturing activities.

minimum working inventory".[2] The record in the *Hooven* case also makes it clear that as a bale of fiber was removed from the warehouse, it was immediately charged as being "in process".[3] What did not appear in the record was whether the goods removed from the warehouse were sufficient for the Hooven Company's "*immediate* current needs". It is to this point that Chief Justice Stone addressed his remarks.

Despite Chief Justice Stone's careful limitation of a possible "current operational needs" theory to materials held for immediate use in the factory, or, perhaps, to materials in a warehouse which, considering the nature of the manufacturing operation, would ordinarily have been required in the factory, the Wisconsin courts have transformed and expanded that theory to make it include all imported materials held in a reasonable working inventory, though in storage in a warehouse or yard and without demonstrated need for immediate current operational requirements.

The error of the Wisconsin courts becomes even more

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2. "Q. How long are they kept in the warehouse usually before they are used? Is there any definite time in which they are kept there?

"[Fol. 52] A. No; it might be we would need the stuff as soon as it got there and again we might not; it comes from long distances and we do not carry any more inventory than we need to; it takes three to six months for it to get to us; we attempt to keep a backlog for that; we attempt to run our business with a minimum working inventory, of course." (R. 42.)

3. "Q. When you take the fiber out of the warehouse do you make a bookkeeping entry to show that it has been removed from the warehouse and charged to some other part of the operation?

"[P. 43] A. Certainly, it is removed from the raw material account and charged into processing in the mill; each bale of fiber as it is removed from the raw material warehouse becomes, according to our records, in process. Of course we have to batch and treat this stuff; it may not be used for a couple of days; but as soon as it leaves the warehouse it is charged in process; the usual procedure in any class of goods, I suppose." (R. 42-43.)

evident when the arguments made by the State of Ohio in the *Hooven* case are considered. In its briefs in this Court Ohio argued that a minimum working inventory of imported materials held in a warehouse by the manufacturer-importer had lost their status as imports because maintenance of a minimum working inventory constituted actual *use* of such materials. Thus, in its summary of argument, Ohio stated:

> "2. The petitioner is a manufacturer and, as such, used quantities of imported fibers. It took from three to six months after an order was placed to get deliveries of such fibers. In order to keep its plant in constant operation, it was necessary to keep a 'backlog' or supply of fibers in its warehouses. The petitioner always operated its business 'with a minimum working inventory' and never bought fibers for the purpose of sale. Under these circumstances, it is contended that the petitioner has used the fibers just as truly as if it had broken the original packages and started them through its mills. By so using the fibers, even if it be the importer, the petitioner has exhausted the tax free privilege of the imports and they are thereafter to be considered as domestic property subject to state taxation."

And, later on in its brief, Ohio stated, after setting forth the portions of the Record on Appeal quoted above:

> "In other words, when the imported goods reached the plant [that is, when they were placed in the warehouse] they were immediately used, in that they were essential to the continuous daily operation of petitioner's plant."

A majority of this Court in the *Hooven* case flatly rejected that argument by noting that goods "held for use" do not lose their character as imports any more than do goods imported for sale while held for sale.

It is significant that the dissenting opinion in the *Hooven*

case did not embrace the "current operational needs" theory. The dissenting justices would have held that all goods "awaiting use" in manufacturing do not have the same status as imports as do goods held for sale. Why did not the dissenters seize upon the "current operational needs" theory? The answer seems clear—the dissenters understood that Chief Justice Stone's suggested "current operational needs" theory, to the extent it might ever be recognized, would not subject to state taxation that portion of the imported goods, in original packages or form, which remained *in storage in the taxpayer's warehouse.*

(d) Loss of character of goods as imports, based on "current operational needs," infringes upon the power of the Federal Government.

The Constitution granted the taxation of imports to the Federal Government. Tariffs and duties have been a source of revenue for the Federal Government, though no longer its most important source. Of even greater significance, however, is the control exercised by our Federal Government over the size and amount of duties on imports. Decreasing and increasing duties and tariffs provides an important instrumentality for establishing and maintaining relationships with foreign countries. Since an ad valorem tax adds to the cost of an import to the same degree as the size of a duty, permitting an importer to be so taxed by the states would shift control over the flow of imports from our Federal Government to the states.

In these critical days in world affairs, the increasing importance of the United States as a stable influence requires that every instrumentality at the command of the Federal Government be preserved to enable it to meet that responsibility. An effective means of maintaining and improving relationships with other countries is to encourage foreign commerce. The flow of imports must be controlled by the Federal Government in order to achieve this

goal. Surrender of this control over imports to the states at this time, or perhaps at any future time in our history, would be gravely inappropriate. No strained construction of the import clause of the Constitution, in conflict with a well established and clear meaning, is now justified.

VII.

Petitioner's Imported Goods on the Date of Assessment Had Not Lost Their Character as Imports.

The veneers stored in the original package met all established requisite tests (R. 9) to their continued immunity on the date of assessment.

With respect to the lumber, the trial court found that it had been subjected to manufacture on the date of assessment. This was based upon a finding that the dominant purpose of the piling was air drying which reduced the period of time required in the kilns, though all lumber had to be kiln dried for use in the manufacturing process (R. 17).

One of the purposes of stacking the lumber in a manner which would permit air drying is to avoid rotting which naturally results when air is not permitted to gain access to the individual sticks. On the basis of the rules announced in *Brown* v. *Maryland, supra,* and thereafter continuously followed and adhered to, the question becomes one of whether the importer had so acted upon the goods as to mix them up with the mass of property in this country. The stacking did prevent rotting. Whatever separation of moisture from the wood occurred was entirely accidental and was inevitable from a mere lapse of time.

Though it would seem clear that stacking for storage and a lapse of time could not be considered action upon the goods within the meaning of the authorities, it was

certainly less acting upon the goods so as to mix them up with the mass of property in the country than to open original packages, compress their contents and repackage them for shipment. In *Southern Pacific Co.* v. *City of Calexico, supra,* such acts were deemed not sufficient acting upon the goods to mix them up with the mass of property in the country. The acts of the importer here seem clearly to be less than the heat treatment of crude oil so as to change its viscosity and enable its transportation by pipeline into storage tanks. Such change in the viscosity of oil was deemed not so acting upon the goods as to mix it up with the mass of property in the country in *Mexican Petroleum Corp.* v. *Louisiana Tax Commission,* 173 La. 604, 138 So. 117 (1931).

The air drying of the lumber was entirely a natural occurrence. No artificial means were employed. The sticks of lumber were not acted upon by men, machines or any kind of equipment after unloading and stacking in the storage yard. Natural occurrences during a period of storage do not constitute subjection to a manufacturing process. In *Grinnel Corp.* v. *Bowers,* 167 Ohio St. 267, 147 N. E. 2d 657 (1958), the natural maturation and mellowing of whiskey in charred oak barrels was held not to change the status of the whiskey from "stored goods" to a "manufacturing process." Many stored goods require that some means be taken to prevent deterioration. In *General Cigar Co., Inc.* v. *Peck,* 159 Ohio St. 152, 111 N. E. 2d 265 (1953) the owners of stored tobacco, for its preservation, heated and aerated the leaves. The tax authority contended that this constituted the first step in the manufacturing process of the tobacco. However, the court held that this position was untenable; that precautions required to preserve a stored product do not constitute processing or a step in the manufacture of a product.

The California Supreme Court in *E. J. Stanton & Sons* v. *Los Angeles County*, 78 Cal. App. 2d 181, 177 P. 2d 804 (1947) on other grounds sustained a tax on imported lumber, but emphasized that it was not seeking to tax lumber stacked in piles to prevent rotting even though the lumber had been sorted according to size, grade and specie.

It cannot fairly be said that because of the natural drying of the lumber it had thus been subjected to the manufacturing process. The generally accepted meaning of the term "manufacturing process" is that some acting upon the material to transform it to a different state or thing is required. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 65 S. Ct. 961, 89 L. Ed. 1320 (1945).

Regardless of the dominant purpose of the importer and the natural drying which took place, there was not present here such acting upon the goods as to mix it up with the mass of property in this country which would result in loss of character as an import. The drying of the lumber was inevitable. Air drying began from the time the logs were cut into lumber in Canada and went on while the lumber was stored there for shipment, loaded aboard cars and during the period of its transportation to Algoma, Wisconsin.

To hold that this natural occurrence constituted subjection to manufacture would be to require, as a condition of continued immunity and preservation of character as an import, the introduction of artificial means to prevent drying, thus calling for far more substantial acting upon the goods by the importer. Hence, loss of some moisture through wholly natural causes, without any action of the importer or material change in form of the goods, cannot fairly be considered as a change in character of the lumber as an import.

Both the trial court and the Wisconsin Supreme Court were disturbed about the absence of packaging of the lumber and referred to the penumbral case of *E. J. Stanton & Sons* v. *Los Angeles County, supra.* The California Court and the Wisconsin Court in their examination and consideration of the original package doctrine, overlooked the rule ever since *Brown* v. *Maryland, supra,* that immunity extends both to packaged and unpackaged goods. It was for this reason that the courts have always referred to original package *or form* and have looked to the form or change therein as one of the important factors in determining whether the goods had lost their character as an import. The absence of packaging has not been considered by this court to be significant. *Hooven & Allison Co.* v. *Evatt, supra; License Cases,* 5 How. 504, 12 L. Ed. 256 (1847).

The Wisconsin Court seems to be deeply concerned about discrimination in favor of imported goods if the rule announced by the majority in *Hooven & Allison Co.* v. *Evatt, supra,* is adhered to. Chief Justice Stone in the latter case disposed of that argument by calling attention to the fact that such discrimination as there may be is implicit in the constitutional provision and that it is not up to the courts to alter it.

Conclusion.

Petitioner, United States Plywood Corporation, respectfully submits that the judgment of the Wisconsin Supreme Court should be reversed with directions to enter judgment for the Petitioner against the Respondent on Petitioner's claim for refund of $2,677.46 with interest from January 4, 1956.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 44

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

REPLY BRIEF OF PETITIONER

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IN REPLY TO RESPONDENT'S BRIEF ON THE MERITS AS TO THE VENEERS

I.

The respondent's brief is constructed on the proposition that the rule of *Brown v. Maryland* and *Hooven & Allison Co. v. Evatt*—namely, that, *while imports remain the property of the importer, in his warehouse, in the original form or package in which imported, a tax on them is too plainly a tax on imports to escape the constitutional prohibition*—is beside the point. The impor-

tant thing, says the respondent, adroitly phrasing its statement in the negative, is that

> "In no case has this Court held that imported articles in the warehouse of and owned by the importer, in the unopened package or form in which imported, may not have at the same time been put to the use for which imported and, therefore, be subject to state taxation." (Brief for respondent, p. 8)

Put affirmatively, rather than negatively, the quoted statement says only that this Court has not closed the door to the possibility that imports, in the warehouse of the importer, in the original form or package in which imported, *might* be subject to state taxation *if* acted upon by the importer or put to the use for which they were imported. Obviously, this statement leaves us where we started unless it can be shown that such imports *have in fact been acted upon or put to the use for which they were imported.* This the respondent has entirely failed to do.

Except for the case of passage of title for hypothecation, which was deemed action upon the goods equivalent to a sale, respondent's brief contains only one suggestion as to how imported goods held in the warehouse of the importer, in the original form or package in which imported, might nevertheless be acted upon by the importer and thereby become subject to state taxation. In that suggestion the respondent conjures up a "new, low cost ray-penetration device" whereby imported raw materials would be "improved" while being held in a warehouse. Petitioner concedes that, if the imported veneers in the instant case had been so treated at a time when they were held in petitioner's warehouse, such veneers might well be subject to state taxation. But they would be subject to state taxation not because they were held in a warehouse available for ultimate use in a manufacturing proc-

ess, but rather because, despite the fact they were held in storage in a warehouse, they had in fact been subjected to a manufacturing process.

By actual count, the respondent has stated nine times in its brief that the reported veneers had been acted upon by the petitioner or had been put to the use for which they were imported.* But nowhere in its brief does the respondent set forth *how* the petitioner acted upon the veneers or put them to use. This is not surprising since the facts, as set forth in the Record on Appeal, cannot be construed as establishing any action upon the imported veneers or any putting them to use by the petitioner while they remained in storage in the petitioner's warehouse. The record certainly makes no reference to any "new, low cost ray-penetration device". The fact is that the veneers sought to be taxed were at all times in storage, in the importer's warehouse, in the original package in which imported and segregated from the mass of taxable property in Wisconsin. They had not on the tax day been treated or processed in any way or otherwise subjected to manufacture.

II.

Having attempted to dismiss the holding in the *Hooven* case by stating what this Court had *not* held in previous cases dealing with attempts to tax imports, and by creating the image of a ray-penetration device which, if used in the manner suggested, might overcome the presumption that imported goods held in a warehouse are not being subjected to a manufacturing process, the respondent seeks to rely on Mr. Chief Justice Stone's remarks in the *Hooven* case concerning the "current operational

* See Brief for respondent, pp. 5, 7, 13, 14, 19, 20 and 21.

needs" of a manufacturing business. (Brief for respondent, p. 18) In quoting "the reasoning of this Court" on the subject of "current operational needs", the respondent failed to include the topic sentence of the relevant paragraph in the *Hooven* opinion, or even to indicate that such topic sentence was omitted from its brief. That sentence declares unequivocally that "it cannot be said that the fibers were subjected to manufacture when they were placed in petitioner's warehouse in their original packages". In essence, what the respondent would have this Court hold is that a manufacturing process begins while goods are being held in a warehouse awaiting use; in fact, this Court held in the *Hooven* case that the manufacturing process "cannot be said" to begin there.

There is not any difference between the facts in the *Hooven* case and the facts in the instant case. The difference in the records of the two cases (but not in the facts) upon which the respondent relies is that, in the instant case, a determination was made that 50% of the imported veneers in storage had somehow entered the manufacturing process. This determination has no more basis in the record in the instant case than a similar determination would have had in the record in the *Hooven* case. Such a determination is not a finding of fact, but rather a conclusion of law in clear conflict with this Court's above-quoted statement in the *Hooven* case.

The key concept in determining whether imported goods have retained their immunity from state taxation is not "current operational needs" of a business but is rather the concept of storage awaiting use. If imported goods are, in fact, being held for use by the importer, it follows that such goods have not yet been "acted upon" by the importer and have not yet been "put to the use for which they were imported."

The respondent would have this Court extend the concept of "a manufacturing process" to encompass the holding of goods for use. The respondent is handicapped by the fact that this question is no longer open. Under the *Hooven* case, imported raw materials being held for use in a manufacturing process are not subject to state taxation so long as they remain in storage, in the warehouse of the importer in the original form or package in which imported.

III.

Even if we were to accept completely the respondent's reasoning and analysis, we would be constrained to find that the respondent had not proved its case. This is because even under the respondent's analysis two questions must be answered:

Have the veneers been "acted upon" by the petitioner; if so, how? The respondent's answer has been and can only be, by placing them in storage in a warehouse and holding them for use in a manufacturing process. Under the *Hooven* case, this is obviously not enough.

Have the veneers been "put to the use for which they were imported" by the petitioner; if so, how? Again, respondent's answer can only be, by placing them in storage in a warehouse, and this is likewise obviously not *the use* for which they were imported and, under the *Hooven* case, is not any *use* at all.

But the respondent's reasoning and analysis cannot be accepted. The respondent has sought in its brief to dismiss as a "corollary" to the general rule applicable to imports the consistent holdings of this Court that while imports remain the property of the importer, in his warehouse, in the original form or package in which im-

ported, a tax on them is too plainly a tax on imports to escape the prohibition of the Constitution. But whether such holdings of this Court are called a "corollary" or are called a rule of law, the fact remains that this Court has always affirmatively held that imports so held are not subject to state taxation.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 44

UNITED STATES PLYWOOD CORPORATION,
Petitioner,

vs.

CITY OF ALGOMA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin.

Brief of Respondent

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Brief of Respondent

QUESTIONS PRESENTED.

1. Does Article I, Section 10, Clause 2 of the Constitution of the United States prohibit the levy of a general *ad valorem* tax by a state upon that part of imported lumber and veneer which is inventory necessary for "current operational needs" of taxpayer, the imports being in their original form and packages in which imported and being owned by and in the storage yard and warehouse of importer-taxpayer?

2. Does Article I, Section 10, Clause 2 of the Constitution of the United States prohibit the levy of a general *ad valorem* tax by a state upon imported lumber which is stored in importer's storage yard with the dominant purpose of removing the moisture from the lumber by air drying, the lumber being in the form in which imported and being owned by importer-taxpayer?

STATEMENT OF THE CASE.

This proceeding is for review of that portion of the judgment of Circuit Court for Kewaunee County, affirmed by the Supreme Court of the State of Wisconsin, which denied petitioner's claim for recovery in the sum $2,677.46 of a general *ad valorem* property tax paid under protest, assessed upon the imported lumber and veneer of petitioner-importer while in its storage yard and warehouse in the original packages or form in which imported. Petitioner is not contesting the imposition of the tax on imported lumber and veneer which had been removed from petitioner's warehouse and storage yards to its factory.

United States Plywood Corporation, the petitioner, conducts a manufacturing business in Algoma, Wisconsin. On May 1, 1955, the assessment date, it used both foreign and domestic veneers and lumber in its manufacturing operations. (R. 30) On May 1, 1955, petitioner had imported lumber and veneer stored in its warehouse and storage yard. It is the imposition of the tax on these imports which petitioner has contested.

Foreign veneers were imported by petitioner from Canada, France and the Belgian Congo. The foreign veneers were received in Algoma in the original packages in which they were shipped. They were kept in such packages, segregated and stored in petitioner's warehouse until used in the manufacture of veneered products (Find-

ing No. 4, R. 30). Veneers in original packages were piled separately according to specie, without regard to whether the adjacent pile was of foreign or domestic origin and without regard to the time of receipt. A portion of a new shipment of fuma veneer, for instance, would be placed on a partially depleted pile of that veneer and could be the first next taken for use.

Foreign lumber was imported by petitioner from Canada, in rough, unplaned form. It was shipped loose in railroad cars, the sticks or individual pieces of lumber not being bundled or fastened together in any other way. Most of the foreign lumber was purchased and received "green". The lumber when received was piled in petitioner's storage yard in such manner as to facilitate air drying. (R. 30) While the method of piling adopted was intended also to prevent decay, it cannot be said that this was the dominant purpose; (R. 17) the dominant purpose was to subject the lumber to air drying before converting it into a manufactured product. (R. 30) Air drying never sufficiently removes the moisture content of lumber to permit its use by petitioner without running the lumber through dry-kilns. Green lumber is not generally run through the dry-kilns without a period of air drying, and it is not "good business practice" so to do. At least as to the lumber received green—which accounted for most of the Canadian lumber—when it was received and piled, the dominant purpose was to prepare it for use by air drying, thus by a slower but more economical process accomplishing in part what kiln drying would accomplish. (R. 17) While green lumber may be wholly kiln-dried, it was petitioner's practice, and also good business, to subject green lumber to air drying before running the lumber through the dry kilns. That is more economical than wholly kiln-drying green lumber. (R. 30)

There was no co-mingling of foreign and domestic veneers or foreign and domestic lumbers so as to cause a loss of identity. (R. 16)

On May 1, 1955, petitioner had on hand imported lumber and veneer in storage in its warehouse and storage yard of the value $288,593.00. The assessor had determined that one-half of the imported veneers and lumber were necessarily on hand to meet petitioner's current operational needs as a manufacturer and assessed them at $144,296.26. The Circuit Court concluded that the assessor's determination was fair to the petitioner, and so found. (Finding No. 6, R. 31).

The Circuit Court considered the assessor to be in error in not regarding a portion larger than one-half of the foreign lumber as being taxable. (R. 16) The Circuit Court found that most of the foreign lumber on hand in piles in the storage yard on May 1, 1955, was lumber which had been received in green condition, and that all such green lumber was then being subjected to the manufacture for which it was imported. (R. 31)

Petitioner appealed, without settlement of a bill of exceptions, to the Supreme Court of the State of Wisconsin, which affirmed the judgment of the Circuit Court in denying to petitioner the right to recover the taxes paid by petitioner upon the imported lumber and veneer.

The immunity of the imported lumber and veneer from general *ad valorem* taxation under Article I, Section 10, Clause 2 of the Constitution of the United States, was claimed by petitioner at every stage of the proceedings. The constitutional issue was discussed in the Circuit Court opinion, (R. 9-19) and in the opinion of the Supreme Court of Wisconsin. (R. 34-46)

SUMMARY OF ARGUMENT.

1. Imports, when put to the use for which imported, lose the immunity from state taxation accorded by Article I, Section 10, Clause 2 of the Constitution of the United States. Since imports in their original form or package, owned by and in the warehouse of the importer, may at that same time have been put to the use for which imported and, therefore, be taxable by the state, the "original package doctrine" may not be as reliable a test now as it has been in the past.

2. Neither Wisconsin court relied on any principle governing interstate commerce. The Trial Court used the words "stream of commerce" and "transport" to emphasize that the imports had come to rest. The Supreme Court of Wisconsin referred to interstate commerce to illustrate that some of the dicta of Chief Justice Marshall have not been followed by the Supreme Court of the United States.

3. The application of the "original package doctrine", without giving consideration to whether the imports have been put to the use for which imported, has brought varied results.

4. The Wisconsin Supreme Court did not base its decision on the fact that the imports were awaiting use in the future, but, rather, that a recognition of the practical facts of industrial life applied to petitioner's operation compelled the conclusion that the imports were taxable because put to the use for which imported.

5. A consideration of the practical facts of industrial life lead to the conclusion that petitioner's imports were taxable as inventory necessary for "current operational needs". The inventory of imports necessary for "current

operational needs" was as fully committed to petitioner's operations at Algoma as were the land, buildings and machinery, the taxability of which petitioner does not question. The fact that no bill of exceptions was prepared indicates that, if as much of petitioner's imports as are necessary for "current operational needs" are found by this Court to be taxable, the actual amount determined by the Trial Court to be necessary is satisfactory.

6. As a necessary step in manufacture, "green" lumber must first have the moisture removed by kiln drying or air drying. Air drying is more economical and business-like. Most of the imported lumber was "green". Petitioner piled the lumber in its storage yard with the dominant purpose of air drying, and the lumber at that moment entered the manufacturing process.

7. Admittedly some discrimination in favor of the user of imports is implicit in the constitutional provision. In view of the fact that the competitive conditions under which business is conducted are very real, reason dictates that the immunity of imports should not be extended further than the law makes necessary.

ARGUMENT.

I.

IMPORTED ARTICLES BECOME TAXABLE WHEN PUT TO THE USE FOR WHICH IMPORTED, REGARDLESS OF THEIR BEING IN THE PACKAGES OR FORM IN WHICH IMPORTED.

The Trial Court found, and the Supreme Court of Wisconsin affirmed, that one-half of petitioner's imported lumber and veneer was taxable by respondent because these imports were necessary inventory for "current operational needs," and, that the lumber was taxable for the additional reason that it had entered the manufacturing process while being subjected to air drying by petitioner.

The controlling constitutional provision is Article I, Section 10, Clause 2 of the Constitution of the United States, the applicable part being:

> "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * * ".

If the petitioner's imported lumber and veneer had lost their status as imports on May 1, 1955, they were liable to taxation by the City of Algoma. If these articles had on that day of assessment not lost their status as imports, they were not liable to taxation by Algoma.

It is respondent's position and the basis for decision by the Wisconsin Supreme Court in this case that under *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 686, and *Hooven and Allison* v. *Evatt*, 324 U.S. 652, 65 S.Ct. 870, 89 L. Ed. 1252, one-half of petitioner's imported lumber and veneer was taxable by respondent because it had been put to the use for which it had been imported. Respondent

recognizes the importance of citations in petitioner's brief of cases under particular fact situations in which this Court has held imports not to be taxable by states; respondent respectfully suggests that emphasis should be placed rather in determining at what point imported articles cease to be imports and, therefore, become taxable. In no case has this Court held that imported articles in the warehouse of and owned by the importer, in the unopened package or form in which imported, may not have at the same time been put to the use for which imported and, therefore, be subject to state taxation. Emphasis should be placed on whether the imported article has been put to the use for which imported, rather than merely on whether it is in its original form or package.

In *Brown* v. *Maryland, supra,* this Court first laid down the rule by which it can be determined at what point an imported article has lost its status as an import. After stating that the words of prohibition in Article I, Section 10, Clause 2 of the Constitution ought not to be pressed to the utmost extent, that sound principles of construction ought to restrain all Courts from carrying the words of prohibition beyond the object the Constitution is intended to secure, that the point where the power of the federal government to tax ceased and that of the state arose was difficult to distinguish, that the distinction exists and must be marked as the cases arise, that until the cases do arise it might be premature to state any rule as being universal in its application, this Court laid down a tentative rule as follows:

> "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; * * *" (p. 441)

This rule has been followed since that time. Thus this Court stated affirmatively at what point an imported article lost its status as an import, namely, at the moment it was acted upon and put to the use for which it had been imported. Immediately after the above quotation, the Court completed the sentence by stating in negative terms a corollary to the rule, as follows:

> "* * * but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." (p. 441)

The effect of the rule is that an imported article becomes subject to the taxing power of the state when it has been put to the use for which it was imported. The corollary is to the effect that the imported article, while it remains the property of the importer, in his warehouse, in the original form or package in which it was imported, has not been put to the use for which it was imported. The corollary does not pretend to be as broad as the general rule; the corollary is the application of the general rule to the facts of the case, which involved an article for sale imported into an agrarian, non-industrial country one hundred thirty years ago. This Court was there dealing with property which obviously had not been put to the use for which it had been imported.

There is additional evidence in *Brown* v. *Maryland, supra*, of this Court's opinion that an imported article loses its status as an import when put to use for which it was imported. The State of Maryland objected that, if the tax were not upheld, "an importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation." (p. 443). Answering the objection, this Court explained that the reason why such property

is taxable is that " * * * the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer." (p. 443). In other words, an imported article becomes taxable locally at the moment it is put to the use for which it was imported. There was no occasion in *Brown* v. *Maryland, supra,* for this Court to consider, and the Court did not consider, whether an import, owned by and in the possession of the importer, in its original package in his warehouse, could under certain conditions be considered to have been put to the use for which it had been imported and, therefore, be taxable.

In *Low* v. *Austin,* 13 Wall 29, 20 L. Ed. 517, in which the importer of champagne was taxed by the state while the champagne remained in his possession and ownership, this Court held that under *Brown* v. *Maryland, supra,* the tax was improper. The opinion merely follows *Brown* v. *Maryland, supra,* and adds nothing of assistance in determining when an imported article loses its status as an import.

It was decided in *F. May and Company* v. *City of New Orleans,* 178 U.S. 496, 44 L. Ed. 1165 (1900), in which original, unopened, smaller packages of dry goods were imported into the United States in large containers, that, after the importer had opened the large shipping containers and removed the smaller packages, the dry goods could be taxed even though the goods remained in the original, smaller packages in which they had been put by the foreign manufacturer, stating the test in the following words:

> "So the question in the present case is whether the plaintiffs, prior to the assessment complained of, had *so acted upon* the goods imported by them as to incorporate them with the mass of the property in the state, and bring them, while in their possession, within the range of local taxation." (p. 508)

Of the same effect is *Waring* v. *Mayor of Mobile*, 19 L. Ed. 342, 75 U.S. 110 (1869), in which the salt was imported by the shippers or consignees, and the complainant was the purchaser and not the first vendor of the imported salt. It was decided that under *Brown* v. *Maryland, supra*, the salt had been put to the use for which it had been imported:

> "When the importer sells the imported articles, or otherwise mixes them with the general property of the State by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer." (p. 346)

The petitioner herein recognizes the use test. On page 9 of its brief, after alluding to the claimed immunity under the "original package" doctrine, petitioner suggests that other circumstances, such as hypothecation of goods or changes of condition by artificial means, might change the character of the goods as imports; respondent suggests that such change in the character of the goods as imports might occur even while the goods were in their original package in the hands of the importer. Such a case is *Southern Pacific Company* v. *Calexico*, 288 Fed. 634, in which the goods, in their original packages in the hands of the importer, were pledged for a loan; the imports in such condition were held to be taxable because they had been put to use by the importer.

The use test was recognized in *Hooven and Allison* v. *Evatt*, 324 U.S. 652, 89 L. Ed. 1252 (1945), which dealt with the right of the State of Ohio to tax imported fibers,

while the fibers were owned by and in the warehouse of the importer in unbroken packages. At page 652 it is stated that such imports in the importer's warehouse were immune from local taxation until they are sold or removed from the original package, or until they have been "put to the use for which they were imported;". Twice on page 665, this statement is reiterated in a slightly different form, in the second of which this Court again recognizes the use test in the following words:

> "Plainly if and when removed from the package in which they are imported, *or* when used for the purpose for which they are imported, they cease to be imports and their tax exemption is at an end." (p. 665) (Emphasis supplied).

The Court does not thereby say or imply that unopened imported articles, owned by and in the warehouse of the importer, may not at the same time have been put to the use for which they were imported; but, rather, that, when either fact exists, (1) when removed from the package or (2) used for the purpose for which imported, the articles cease to be imports and their tax exemption is at an end. The same idea is again set forth in the *Hooven* case in somewhat different words:

> "Unless we are to ignore the constitutional prohibition we cannot say that imports for manufacture are not entitled to the immunity which the Constitution commands, and we see no theoretical or practical grounds for saying, more than in the case of goods imported for sale, that the immunity ends while they are in the original package *and before they are devoted to the purpose for which they were imported.*" (p. 668) (Emphasis supplied.)

It can properly be assumed that under the *Hooven* case imported goods which have been put to the use for which they were imported are taxable, regardless of the fact that they may be in the original package or form in which imported.

To illustrate how the passage of time might make the "original package doctrine" less trustworthy than it was when first enunciated and less reliable as a starting point from which to determine at what moment imports become taxable locally, let all the facts in the *Hooven and Allison* v. *Evatt, supra,* be assumed, and let this fact be added: that as a result of scientific experiment a new, low-cost ray-penetration device in taxpayer's warehouse was sending rays through the packaged fibers, with resulting improvement to the fibers and reduction in manufacturing costs. In such case, the fibers, even though meeting all the tests of the "original package doctrine," would have been put to the use for which imported, and their immunity from local taxes would have ceased. The case in illustration shows that, while the "original package doctrine" may have value in helping to determine in some cases that imports have not been put to the use for which imported, in other cases it is not reliable in determining at what point imports are put to the use for which imported, for the reason that imports can meet all the tests of the "original package doctrine" and at the same time have been put to the use for which they have been imported.

Respondent believes and the Wisconsin Supreme Court held that in the case at bar at least one-half of the imported lumber and veneer, owned by petitioner and in its warehouse, in the unopened package or form in which it was imported, had been put to the use for which imported, had lost its status as an import and had become taxable by respondent.

II.

DECISION OF WISCONSIN SUPREME COURT DOES NOT REST ON PRINCIPLES GOVERNING INTERSTATE COMMERCE.

The Wisconsin Supreme Court, as well as the Trial Court, held one-half of petitioner's imported lumber and veneer to be taxable because put to the use for which imported.

While respondent agrees with petitioner that the character of property as an import is not to be determined by its future use, respondent cannot agree that it is a fundamental principle, as claimed by petitioner, that the character of property as an import is to be determined by its physical condition, or that any one of the three cases cited on page 8 of Petitioner's Brief so hold. No one of the cited cases changes or qualifies the rule of *Brown* v. *Maryland, supra,* that imports lose their status as such when put to the use for which imported.

Respondent respectfully suggests that petitioner is in error in assuming on pages 10-11-12-13 of its brief that the "trial court, and to a major degree the Wisconsin Supreme Court, in considering import immunity, relied upon principles" governing interstate commerce. Petitioner has pointed out no instance in the opinion of either court on which petitioner bases its assumption. The Trial Court did not mention interstate commerce or even allude to it. At one place in its opinion (R. 13) it uses the terms "stream of commerce" and "transport" in connection with the imported veneers, but solely to illustrate and emphasize that in the Court's opinion the goods had definitely come to rest in the importer's plant and had been put to the use for which imported. Mere lack of movement in the future was what the Court was emphasizing.

In its opinion the Wisconsin Supreme Court mentions interstate commerce in two paragraphs. (R. 38, 44) Because of the amount of space given in petitioner's brief to its argument that "to a major degree the Wisconsin Supreme Court, in considering import immunity, relief upon principles adopted by this Court governing goods in interstate commerce" (Petitioner's Brief p. 10), the two excerpts from Justice Wingert's opinion are herein set forth as follows:

> "Chief Justice Marshall said much more in the course of his lengthy opinion, by way of argument, illustration and dictum, and on another branch of the case held that the Maryland statute was also invalid under the commerce clause of the constitution (Art. I, Sec. 8). It is no disparagement of the great Chief Justice to point out that some of his dicta have not been followed by the court in later cases, as for example, that to the effect that the principles laid down in *Brown* v. *Maryland, supra,* would apply equally to importations from a sister state. (12 Wheat. at 449) It has later been held consistently that goods brought from another state are not imports within the meaning of Art. I, Sec. 10 of the United States Constitution. *Woodruff* v. *Parham,* 8 Wall. 123, 136, *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 520. Likewise his original package doctrine has been repudiated as a criterion of immunity of interstate shipments under the commerce clause, from state taxation. *Sonneborn Bros.* v. *Cureton,* 262 U.S. 506." (R. 38)
>
> "Foreign commerce, like commerce among the several states, 'is not a technical legal conception, but a practical one, drawn from the course of business.' *Swift & Co.* v. *United States,* 196 U.S. 375, 398." (R. 44)

A fair interpretation of the first quoted excerpt is that it illustrates, so far as it pertains to interstate commerce, that parts of the opinion of Chief Justice Marshall in

Brown v. *Maryland, supra,* were not followed by this Court in later cases. Comment on the second quoted excerpt is unnecessary. Nothing in the Memorandum Decision of Judge Duquaine, the trial judge, or in the opinion of Justice Wingert for the majority in the Wisconsin Supreme Court, whether read in or out of context, suggests petitioner's position that the Wisconsin courts, in considering import immunity, relied in any degree upon principles adopted by this Court governing goods in interstate commerce.

III.

THE "ORIGINAL PACKAGE DOCTRINE" IS NOT THE SOLE TEST TO BE USED IN DETERMINING WHETHER PETITIONER'S IMPORTED LUMBER AND VENEER HAVE BEEN PUT TO THE USE FOR WHICH IMPORTED.

Respondent agrees with petitioner that goods imported for manufacture do not lose their character as an import any sooner than goods imported for sale. In fact, neither loses its character as an import until it has been put to the use for which it was imported. The test is the same for both types of imports and was originally laid down in *Brown* v. *Maryland, supra,* starting at the bottom of page 441, as shown in Section I of this brief.

Much of the difficulty which has arisen in cases involving taxation of imports appears to be the result of confusing the corollary with the rule itself, *i.e.*, applying the "original package doctrine" instead of testing whether the imports have been put to the use for which imported. The "original package doctrine" was a convenient rule-of-thumb and worked well in the early agrarian days of this country when goods were imported primarily for sale. Yet, Chief Justice Marshall indicated that the problem was great. *Brown* v. *Maryland, supra,* at the bottom of page 441. In

the *License Cases,* 5 How. 504, 575, 12 L. Ed. 256, 288, Chief Justice Taney gave his opinion that "The question, I have already said, was a very difficult one for the judicial mind." *Waring* v. *Mayor of New Orleans, supra, Low* v. *Austin, supra,* and *May* v. *New Orleans, supra,* were cases involving imports for sale and presented no outstanding difficulty under the "original package doctrine". As industry increased, the difficulty in administering Article I, Section 10, Clause 2 of the Constitution increased. For example, the taxation of fungible imports has, in an attempt to apply the "original package doctrine", brought varied results. *Mexican Petroleum Corp.* v. *City of South Portland,* 121 Me. 128, 115 Atl. 900 (1922); *Mexican Petroleum Corp.* v. *Borough of Roosevelt,* Case No. 209, (Sup. Ct. N.J., Oct. 14, 1919) (unreported); *Galveston* v. *Mexican Petroleum Corp.,* 15 F. 2d 208 (S.D. Tex., 1926); *Mexican Petroleum Corp.* v. *Louisiana Tax Commission,* 173 La. 604, 138 So. 117 (1931).

Unopened imported goods, owned by and in the possession of the importer—fulfilling all the requirements of the "original package doctrine"— were held, when hypothecated for a loan, to be taxable because put to the beneficial use of the importer. *Southern Pacific Co.* v. *City of Calexico, supra.*

In *Hooven and Allison* v. *Evatt, supra,* involving the right of the State of Ohio to tax imported fibers in their original package while owned by and in the warehouse of the manufacturer, awaiting manufacture, the "original package doctrine" was applied, and the imports were held to be not taxable. Whether some of the fibers were so essential to "current manufacturing requirements" as to be considered to have entered the process of manufacture and hence taxable for the reason that they had already been put to the use for which imported, was not considered by this Court, because the Supreme Court of Ohio did not

make its decision on that ground. The reasoning of this Court is as follows:

> "And it is unnecessary to decide whether, for purposes of the constitutional immunity, the presence of some fibers in the factory was so essential to current manufacturing requirements that they could be said to have entered the process of manufacture, and hence were already put to the use for which they were imported, before they were removed from the original packages. Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." (p. 667)

Therefore, whether any part of an inventory of raw material necessary to meet "current operational needs" can be considered to have entered the manufacturing process, *i.e.*, to have been put to the use for which imported, is undecided. It is with the decision of this question that we are here concerned.

IV.

WISCONSIN DECISION IS BASED ON FACT THAT IMPORTS HAD BEEN PUT TO USE, RATHER THAN THAT IMPORTS WERE AWAITING USE.

Respondent agrees with petitioner that the proposed sale or intended use of an imported article does not thereby render the import taxable. Respondent respectfully suggests that petitioner is in error in the statements on page 14 of its brief that the Wisconsin courts sustained the tax on petitioner's imported lumber and veneer for

the reasons that, since petitioner assembled the goods to change their form, they had been put to use by him; that the goods were held taxable not because acted upon by the importer or changed in form, but merely because of their immediate availability for use (referring to p. 44 of the Transcript of Record); that thereby the Wisconsin Court deemed accomplished that which had in fact not been accomplished; and that the Wisconsin Court thereby used specious reasoning. What petitioner understands to be the basis for the decisions of both Wisconsin Courts is directly opposed to the understanding of respondent. Both Wisconsin Courts held that one-half the imported lumber and veneer was necessary to the current operational needs of petitioner's manufacturing business and had thereby been put to the use for which imported.

While the full reasoning cannot be gained from short excerpts of an opinion, a fair example of the basis for the holding of the Trial Court is:

> "If we accept the premise, as I think we should, that imported raw materials in original packages on hand May 1st, and required to be on hand at that time to meet the immediate or current needs of a manufacturer, have so definitely been taken out of the stream of commerce and have so finally come to rest in his plant, there, to a practical certainty, to lose their identity in a manufactured product, so that it may reasonably be said that it is at least highly improbable that such goods will ever again become the subject of sale and transport in their original packages, then, I think, such raw materials must be regarded for all practical purposes as having irrevocably become a part of the common mass of property within the taxing district and, by virtue of that fact, subject to the state's *ad valorem* personal property tax." (R. 13)

The fair meaning of Judge Duquaine's words is that the imports had been put to the use for which imported. The part of the imported goods that was necessary "to meet the immediate or current needs" not only had come to rest but had been committed to a manufactured product. In an apt example involving newsprint (R. 14) the Trial Court illustrates why necessary or indispensable imports have been put to the use for which imported and have become part of the mass of property within the taxing district, so as to be taxable.

While the opinion of the Wisconsin Supreme Court cannot be treated in piece-meal fashion, the following portion is a fair example of its basis for the conclusion that the imports were taxable because put to the use for which imported:

> "As a practical matter, the minimum current operational requirements of materials which the manufacturer had assembled in his plant for purposes of immediate availability for change in form were in use in and devoted to the manufacturing enterprise, as much as if they were being dried, heated, reshaped, chemically treated, or otherwise changed in form or composition. The purpose for which the veneers were imported was to meet the requirements of a going manufacturing concern; and one of such requirements was the presence of a stockpile equal to minimum current manufacturing requirements. As a practical matter, a manufacturing enterprise cannot be carried on successfully without having current operational requirements of raw materials on hand, especially where it takes a considerable time to get more of the materials after ordering them, any more than it can be carried on without changing their form or compo-

sition. The decision under review merely recognizes and gives significance to that fact of industrial life." (R. 44)

There is nothing equivocal in this statement. If the first half of the first sentence were read alone and out of context, a conclusion similar to petitioner's could be drawn. But, when the whole sentence is read, and then the rest of the paragraph, it is apparent that the Wisconsin Court's decision is based not on a theory of future use but on actual present use on the accepted facts of present day industrial life as they pertain to petitioner's plant, methods and purposes.

V.

WISCONSIN COURTS MADE DECISION BY APPLYING LAW TO PRACTICAL FACTS OF INDUSTRIAL LIFE.

A consideration of the practical facts pertaining to petitioner's operation at Algoma, Wisconsin, may assist in understanding why one-half of the imported lumber and veneer necessary to its current operational requirements was taxable.

Petitioner's manufacturing plant at Algoma, including real and personal property, had a value on May 1, 1955, of slightly less than $5,000,000.00. (R. 2, 3, 32) This figure represents a substantial investment. Petitioner imports veneer directly from the Belgian Congo, France and Canada, and lumber from Canada. Petitioner is not a charitable enterprise. Its purpose is to manufacture wood products and sell them at a profit. To carry out this purpose it had brought together at Algoma many things, among which were land, buildings, machinery, logs, timber, tools, furniture, fixtures and manufacturer's stock, the latter including the imported lumber and veneer. (R. 2, 3) Taken

together, these things represent the means and facilities for making products which can be sold. Except as to the imports, petitioner has made no claim that any of these things is not taxable by respondent. (R. 1-4) When power is applied to this composite group of things, a manufactured product is the result. If any one of these things is absent, there can be no manufactured product. Each of these things has been procured and put in place by petitioner, so that it can turn out a manufactured product. Each thing, when put in place at Algoma, is irrevocably committed to the process of manufacturing a final wood product that can be sold for money, which, in turn, can be used to pay expenses and dividends. Imported lumber and veneer, in an amount necessary for the "current operational requirements" of petitioner in its day to day manufacturing operations, was as irrevocably committed to, and a part of, petitioner's operation at Algoma as the land, buildings, machinery, etc., the taxability of which petitioner does not question. The amount of these imports necessary for "current operational requirements"—necessary to keep the plant going in profitable day to day production—was as fully committed to the use for which it had been imported in making a salable wood product, as if petitioner had opened one of the crates of veneer or put a saw into one of the logs. This is the practical side of the question with which we are here concerned.

It was from a consideration of these practical facts of industrial life and the application of the law to them, that both Wisconsin courts found petitioner's imports to be taxable. The Wisconsin courts did not start with the "original package doctrine", which is a corollary to the general rule, and is discussed in Section I of this brief; rather, they began with the rule itself, as given in *Brown v. Maryland, supra,* to decide whether "the importer had

so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country," (p. 411) *i.e.*, has been put to the use for which imported. Finding in the affirmative, both Wisconsin courts decided that petitioner's imports were taxable. The pertinent parts of the decisions are on pages 13, 14, 15, 16, 43, 44, 45 of the Transcript of Record.

Petitioner adversely criticizes the "current operational needs" test as used by the Wisconsin Supreme Court, because it calls for a subjective determination, it is a partial recognition of the "awaiting use" theory, it is inaccurate, it probably cannot be defined, it caused the Trial Court to speculate on methods for finding a rule for ascertaining what it means, it does not recognize the facts of industrial life, it involves tremendous uncertainty and grave difficulty in administration, it would inevitably lead to the taxation of all imports on hand and it would compel the application of rules applicable to the commerce clause of the constitution. (R. 19, 20, 21, 22) This lengthy indictment, if true, would do away with the "current operational needs" test. But, if consideration is given to the case at bar, the counts of the indictment disappear.

The "current operational needs" test is somewhat new when considered with the "original package doctrine", and it would be strange if it did not present some difficulties. In this respect, it is not alone in the field of law. The Trial Court, in referring to the problems which petitioner had suggested, did not believe them too difficult for solution. (R. 13). In fact, the Trial Court solved them, apparently to the satisfaction of petitioner, notwithstanding petitioner's present objection. It must be remembered that petitioner prepared no bill of exceptions in this case. Petitioner is contesting the constitutionality of any of its im-

ports' being held taxable. Had petitioner been dissatisfied with the Trial Court's finding as to the portion of the imports found by that Court to be necessary for "current operational needs", presumably petitioner would have attacked the finding by preparation of a bill of exceptions in its appeal to the Wisconsin Supreme Court. Since petitioner's appeal was made without a bill of exceptions, we must assume that it was satisfied with that finding.

It should also be remembered that the Trial Court placed on the respondent the burden of proof as to how much of petitioner's imports was essential to "current operational use" and found that one-half was essential. Various criteria were presented at the trial and considered by the Court. (R. 13, 14, 15, 16) As time goes on, other criteria may be suggested. In the meantime, the record in the case at bar is sufficient assurance for the present that the "current operational needs" test can be administered by courts with reasonable certainty and without undue difficulty.

As to the objection that the "current operational needs" test does not fit in with present accounting practices, it need be realized only that present accounting practices arose from business procedure and methods rather than vice versa, and that Professor Rufus Wixon (Petitioner's Brief, p. 23) and the rest of the accountants can be depended upon to show as much ingenuity in the future, as in the past, in interpreting and reflecting business methods and procedures in accounting practices.

The arguments of petitioner on use of the words "factory" and "warehouse" in the majority opinion in *Hooven and Allison* v. *Evatt, supra,* on the arguments of the State of Ohio in its brief in that case and on the failure of the "dissenters" in that case to "seize upon the 'current oper-

ational needs' theory" (Petitioner's Brief pp. 24, 25, 26, 27, 28 and 29) were answered by Chief Justice Stone plainly in that case, in the following words:

> "Even though the inventory of raw material required to be kept on hand to meet the current operational needs of a manufacturing business could be thought to have then entered the manufacturing process, the decision of the Ohio Supreme Court did not rest on that ground, and the record affords no basis for saying that any part of petitioner's fibers, stored in its warehouse, were required to meet such immediate current needs. Hence we have no occasion to consider that question." (p. 667)

The reason is: The matter was not considered. It is being considered in the case at bar.

As to petitioner's assertion that "Loss of character of goods as imports, based on 'current operational needs', infringes upon the power of the Federal Government", (Petitioner's Brief p. 29) it must be realized that no case has held that imported articles preserve their immunity from taxation when they have been put to the use for which imported. Whether our country has maintained and improved its relationships with other countries by encouraging foreign commerce, or not, (Petitioner's Brief p. 29) is a question on which honest and well-informed men have publicly disagreed quite recently. However, this is a political and policy question and has no place in the matter involved in the case at bar. Respondent is not trying to deprive the Federal Government of anything rightfully belonging to it, but, recognizing that we live under a government of law, merely asks that respondent be allowed to tax imported articles which have been put to the use for which imported and have thereby lost their immunity status.

VI.

IN EXCESS OF ONE-HALF OF PETITIONER'S IMPORTED LUMBER HAD ACTUALLY ENTERED THE MANUFACTURING PROCESS.

One-half of petitioner's imported lumber and veneer was found to be taxable because necessary for "current operational needs" and hence put to the use for which it had been imported.

As to the lumber, the Trial Court found that all, or nearly all, of it was taxable for another reason: Because the dominant purpose of piling the lumber in petitioner's storage yard was to remove moisture from the lumber by air drying.

Petitioner's argument on the lumber is to the effect that one of the purposes of stacking lumber in a way which would permit air drying is to avoid rotting, that stacking did prevent rotting, that any separation of moisture from the wood was accidental and inevitable from a mere lapse of time, that the acts of petitioner here seem less than the heating of crude oil to enable it to be transported in pipe lines, that the air drying of lumber was entirely a natural occurrence, that no artificial means were employed, that after stacking the lumber was not acted upon by men, machines or equipment, that precautions required to preserve a stored product do not constitute processing or a step in the manufacture of a product, that the natural drying of the lumber did not thereby subject it to the manufacturing process, that the drying of the lumber was inevitable, that air drying began in Canada and continued during transportation and that to hold the natural drying of the lumber constituted subjection to manufacture would require the importer to introduce artificial means to prevent drying if

the importer were to preserve the continued immunity of the import. (R. 30, 31, 32) In making this argument petitioner has ignored the record in this case.

The Trial Court found that, while the method of piling was intended to prevent the lumber's decaying, this was not the dominant purpose, and that the dominant purpose was to facilitate air drying. (R. 17, 30) Petitioner did not prepare a bill of exceptions to contest this finding, and it must be assumed that the finding is satisfactory to petitioner. The Trial Court gave its reasons for the finding, based on testimony pertaining to the economic realities of petitioner's operation: Most of the imported lumber was "green"; to make a manufactured product, the moisture must first be removed; although the moisture could be removed by kiln drying, the most economical and business-like way to remove moisture is by air drying; the dominant purpose of petitioner in piling the lumber in its yard was to air dry it, and all such piled imported lumber was then being subjected to the manufacture for which it was imported, *i.e.*, put to the use for which imported, using the following words:

> "The assessor would have been warranted in taxing all of the green Canadian lumber. When received by the taxpayer it was not ready for use if good business practices were followed by the taxpayer. When the company received the lumber it immediately proceeded to make it ready for use by subjecting it to the air drying. Such air drying was part of its manufacturing practices." (R. 17-18)

The Wisconsin Supreme Court, in affirming, held the air drying to be the first step in the manufacturing process in these words:

> "It was not necessary that the lumber be sawed up in order to place it in process of manufacture. The imported article consisted of a combination of wood

and diffused water. Drying separates the wood from the water; sawing separates wood from wood. If the lumber had not been air-dried, it would have had to be kiln-dried for a longer time. Obviously it would be in the process of manufacture when drying in an artificially-fired kiln. Removal of water is no less a manufacturing operation when performed out of doors by solar heat." (R. 42)

While respondent doubts that either Wisconsin court was disturbed about the absence of packaging of the lumber (Petitioner's Brief p. 33), *E. J. Stanton & Sons* v. *Los Angeles County*, 78 Cal. App. (2d) 181, 188, 177 P. (2d) 804, 808, cert. den. 332 U.S. 766, removes petitioner's imported lumber from any protection it might have had from the "original package doctrine." However, since the lumber had entered the manufacturing process when it was piled with the dominant purpose of air drying, in addition to being inventory necessary for "current operational needs", the "original package doctrine" is of no importance in respect to the lumber; nor does the fact that the lumber retained the form in which it was imported indicate that it was immune from local taxation, for in the air drying, which was petitioner's dominant purpose in piling it, it had entered the manufacturing process.

VII.

THE DISCRIMINATION IN FAVOR OF IMPORTED GOODS SHOULD NOT BE CARRIED FURTHER THAN NECESSARY.

While it may be doubted that the Supreme Court of Wisconsin was deeply concerned about discrimination resulting from the freedom from local taxation which might arise to an importing manufacturer as opposed to one using domestic stock, that court mentions such possible discrimination. (R. 46) However, any concern shown by that Court did not rest on the rule of the majority in *Hooven*

and Allison v. *Evatt, supra,* but rather on a situation where "the immunity of imported goods extends to the point claimed by appellant" (petitioner herein). (R. 46) The Supreme Court of Wisconsin does not disagree with *Hooven and Allison* v. *Evatt, supra,* but considers that, if the immunity were extended to the point petitioner wants, it would work an affirmative discrimination against users of domestic materials, since the users of imported materials would get the usual local benefits of value without paying for them. (R. 46) The competitive conditions under which business is conducted are very real, and reason would dictate that the immunity of imports should not be extended further than the law makes necessary. The economic consequences of this immunity were considered in *F. May and Company* v. *New Orleans, supra,* starting at the bottom of page 502 and finishing on page 503 with this sentence:

> "It cannot be overlooked that the interpretation of the Constitution for which plaintiffs contend would encourage American merchants and traders seeking to avoid state and local taxation, to import from abroad all the merchandise and commodities which they would need in their business."

The purpose of the framers of the Constitution in respect to Article I, Section 10, Clause 2 was to remove the cause for commercial warfare between the states by taking away from the seaboard states the right to tax imports going to other states and thereby preventing discrimination against imports by taxation. Madison, "Debates in the Federal Convention of 1787" for August 28, 1787 (Hunt and Scott edition, p. 479); "The Records of the Federal Convention of 1787," edited by Max Farrand, Vol. II, pp. 441-2, 1937 edition; *Brown* v. *Maryland, supra,* p. 440; *Hooven and Allison* v. *Evatt, supra,* p. 656. It appears that, instead of there being discrimination against imports, discrimination in favor of imports now

exists in a highly competitive industrial economy, in which imported raw materials play an important part; therefore, the discrimination in favor of imports should not be increased any further than is necessary. While the ground on which the rule of the Constitutional provision is based still exists, that ground with the passage of time and changing conditions has shifted perceptibly.

Admittedly some discrimination is the inevitable result of the immunity from taxation under the Constitution, which in *Hooven and Allison v. Evatt, supra,* p. 667, this Court finds to be implicit in the constitutional provision. Respondent believes that Justice Wingert's suggestion is sound:

> "While such discrimination also results from some applications of the constitutional provision in question by which we are bound, it is nevertheless proper to consider it as a relevant factor in determining whether the immunity should be extended beyond the absolute compulsion of the decisions of the court of last resort." (R. 46)

CONCLUSION.

Respondent, City of Algoma, respectfully requests that the judgment of the Supreme Court of Wisconsin be affirmed.

Respectfully submitted,

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